
**PRACTICE & PROCEDURE
IN CIVIL MATTERS IN THE
COURTS OF RECORDS IN
ANGLOPHONE CAMEROON**

Michael A. Yanou

VISIT...

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Practice & Procedure in Civil Matters in the Courts of Records in Anglophone Cameroon

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Dedication

This book is dedicated to my wonderful wife Mrs Nicholine Musi Yanou and lovely children Masters Michael Lobga Yanou, Dave Tchami Yanou and Dani Yanou.

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Boma and Mrs Irene Samalang) of the Department of Law, University of Buea for their support. This book is part of a broader study prepared and discussed with successive civil procedure classes in the department of law of the University of Buea. I should therefore express my thanks to my former and present civil procedure students for challenging me to put this study on the bookstand. I cannot end without thanking Mr James Chona Kamaha the chief executive officer of the comatrans group of companies Cameroon & Nigeria for empowering Shalom Legal Consultants and putting the office at the cutting edge of legal research.

Foreword

When Prof. Michael A Yanou asked me to write the foreword for Practice and procedure in civil matters in the courts of records in Anglophone Cameroon, I was honoured. As the chief justice of the South West Region of Cameroon with responsibility for directing and overseeing the work of the judiciary in the region, I am keenly aware of the impact and positive influence a book based on Cameroonian law and written by a Cameroonian academic and legal practitioner will make in improving the quality of civil practice in the courts of the Anglophone regions.

This book which is the first of its kind in the rather dynamic domain of civil procedure in our region brings significant local context into the practice of law particularly at this time when civil practice has been radically altered by the country's ongoing effort at harmonizing both the substantive and procedural laws applicable in the courts. The book must be applauded for its detailed analysis of the relevant rules of court applicable in both the high court and court of appeal, the Uniform Acts on Business Laws, Law 2006/015 of December 2006 etc. A major strength of this book lies in the fact that it has been predicated essentially on recent cases of the court of appeals and high courts which apply these laws. These cases have not only demonstrated the way the Cameroonian judge has dealt with local procedural laws but how the differences between Cameroonian indigenous rules of practice and those imported particularly from Nigeria and England are reconciled.

The book which is divided into sixteen chapters covers a wide spectrum of that area of civil practice that forms the core of litigations in the courts of records in the Cameroonian English courts. Although the book has admirably dealt with all the topics addressed, I must single out for praise the author's effort on Actions brought under the simplified recovery

procedures and measures of execution, provisional execution and stay of execution. The book captures very vividly the current evolution on the law regulating provisional and stay of executions which are completely different from Anglo-Nigerian law on the subject. I commend the book's excellent review of some of my own judgments dealing with these topics as well. I hereby recommend this work as a must read handbook for judges, legal practitioners, registry staff, law professors, students and all those interested in the development of the law in Cameroon west of the Mungo.

**Justice (Mrs) Lucy Asuagbor, Chief Justice, South West
Region, Buea**

Preface

Knowledge of the rules of civil practice is at the heart of the actual practice of law in Cameroon as indeed elsewhere. Yet, civil procedure in the English speaking courts of Cameroon has been plagued by the complete absence of a book on civil procedure based on Cameroonian legislation. This unfortunate lacuna has over time meant that judges and legal practitioners alike have had to depend exclusively on Nigerian and English books on the subject which regrettably do not take account of our specificities as a country. Books by foreign authors as I had had noted elsewhere invariably fail to capture the judicial altitudes of the Cameroonian judge as well as the socio-political structure upon which the country laws are predicated.

This book is the first by a Cameroonian author which deals with practice and procedures in the English speaking courts of the former West Cameroon. The author examines various themes and does so in the context of the Supreme Court Civil Procedure Rules Cap 211, Law No 2006/015 of 29th December, 2006 on judicial organization, some aspects of Business Law, The labour Code 1992 etc. The topics covered include the commencement of civil actions, jurisdiction, simplified recovery procedure, pleadings, hearings, appeals, provisional execution, stay of executions etc.

Written by an author who is a renowned researcher with an extensive experience in practice across Cameroon and Nigeria, the book treats the subjects covered with lucidity and an admirable practice oriented style. By taking account of developments under the OHADA laws and their impacts on civil practice in the Anglophone courts, it brings important national perspectives on civil practice to the fore. I welcome this book because it fills a real gap and is written with the

clarity and depth of thought consistent with the author's academic and practice standing.

**Fonkwe Joseph Fongang, Former Supreme Court Judge,
Attorney General, South West Region, Buea**

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Chapter One

General Introduction

Civil practice in the two English speaking regions of Cameroon is based essentially on the Supreme Court Civil Procedure Rules CAP 211. This is an antic colonial era rules of court enacted by the Attorney General of the then Eastern Nigeria pursuant to powers delegated to him under the Eastern Nigerian High Court Law CAP 61. The fact that these rules are still being used here long after Nigerians themselves have amended their rules severally to adapt them to current developments is perhaps one of the saddest commentaries on legal practice in the region.

Counsel must ensure that reliance is not indiscriminately placed on foreign rules or case law based on their interpretation. This is a circumspect advice in practice because of the decision in *Nchotu Paul Ambe v Ngwa Augustine Koti*¹ that rules of court are usually specific to the court in question. Based on this reasoning, the court cautioned counsel to “be careful not to lift rules of court here or there and think that they can be applied elsewhere” noting that it is the Magistrate Court Civil Procedure Rules Cap 124 and the High Court (Civil Procedure) Rules Cap 211 and the Federal Supreme Court Rules 1961 that apply in the magistrate court, high court and court of appeal of the Anglophone regions of Cameroon respectively².

It must be observed however that in spite of what has been said above, there have been significant changes to the rules of practice in the courts of records in the South West and North

¹ Suit No CASWP/99/07/1m/2009 Unreported.

² See also *The Liquidator, Na5onal Produce Marke5ng Board (N.P.M.B) v Egbe Stephen Batuo* Suit No CASWP/44/97.

West regions. Various indigenous legislations have introduced remarkable departures from the traditional common law principles of practice enunciated by Cap 211 and the other rules of practice inherited from Nigeria. These laws include Law No.92/007 of the 14th August, 1992 the labour code, Law No.2006/015 of 29th of December, 2006 on Judicial Organization known generally as the Judicial Organization Law, the Uniform Act on Business Law otherwise generally referred to as the OHADA Laws. Counsel ought to pay attention to this fact when conceiving an action in the High Court and doing appeals in the Court of Appeals of these regions.

It is at this point necessary to have a cursory review of important distinctive features of practice in the region under reference. The country in general (including the region under reference) has a four tier court system which applies the above laws in civil litigations. The current law organizing the judiciary which is the 2006 Judicial Organization Law has adopted these courts. These are:

- i. The courts of First Instance (Magistrate and High Courts)
- ii. The Court of Appeal
- iii. The Supreme Court
- iv. The Constitutional Council.

Although there are Customary Courts and Military Courts, these fall outside the scope of this book mainly because lawyers do not appear in the former while the latter is essentially a criminal court. The constitutional council's arbitral functions are performed by the Supreme Court. These courts are outside the scope of this book for two reasons. Firstly, both adopt civil law rules of practice while hearing civil cases under their original jurisdiction and secondly, the courts are not located territorially in the Anglophone region which is the focus of this book.

Lawyers and practice

Both civil and criminal practice at the High Court can be rather very complex and demanding. Although the law does not insist on this, it must be observed that practice in the High Court is done almost exclusively by lawyers. It is for this reason imperative to undertake a limited discussion of the retention and role of a lawyer in the hearing and determination of cases. The retention of counsel is ideally a formal exercise involving the prospective client approaching the lawyer in the counsel's chambers. As an invariable rule, the client must pay the consultation fee before he/she would have audience with the lawyer. The issue of payment of fees for counsel's service should be discussed at the first meeting between counsel and client. Nothing should be left to chance. The lawyer should state his fee and get an agreement on it ideally in writing. It is as well imperative for the lawyer to indicate the mode and schedule of payment. Where however there is no prior agreement, Counsel is at liberty to get the president of the Bar to fix his fee in event of the client failing to pay after he has offered the latter legal services. Usually practice demands that counsel should draw a distinction between his fees and the cost for filling processes and services which must be borne by the client independent of the latter's fees.

The relationship thereafter is based on the agreement reached with counsel to protect the client's interest. Counsel is advised to insist on this respectable method of practice both for their own and the entire interest of the dignity of the profession. The charlatanic practice of hanging around courts and police/gendarmes stations looking for clients is indeed profoundly unethical and must be discouraged.

In spite of what has been said above, it must as a matter of law be acknowledged that the rules of practice are generally casually interpreted. The Court of Appeal Buea had held that nothing stops a party from engaging counsel a few minutes before stepping into the court hall on the day of the arguments.

It is for this reason that Arrey C J as she then was held in *National Social Insurance v Bar Ngu Gordon Nwabo*³ that the appellant's submission that the respondent counsel was not briefed by them was unmaintainable.

Responding to the contention by the appellant that counsel can only be briefed by a letter of constitution, the learned chief justice noted that although the letter was not given, the appellant was briefed orally by the appellant's representative in Buea to defend their interest. The court in so holding affirmed the submission by counsel for the respondent that the practice of retaining a lawyer only in writing is applicable only in the francophone jurisdiction east of the Mungo.

This view must however be contrasted with that prescribed by the Bar laws. Under it, it has to be shown that the party seeking to change counsel must have ensured that the previous lawyer has been paid and the usual formalities involving the transfer of the case file to the new counsel done. The Court of Appeal's decision above cannot be interpreted as ignoring this rule of practice for the simple reason that this was obviously not the issue before it.

Once engaged, lawyers are under the rules of practice obliged to respect certain duties. Counsel in Cameroon must invariably operate under confidentiality rules similar to what obtains in England. A lawyer is clearly not expected to act as counsel against a party where doing so will put him in a position to disclose confidential information and facts that became known to him in the course of his functions as a counsel to the adverse party. Sime⁴ rationalizes this principle on "the fact that documents and information in the hands of the solicitor are protected by legal professional privilege".

By section 40 of Law No 90/059/90 of 19/12/1990 (the Bar Laws) and article 60 of arête No 41/DPJ/SG/MJ of

³ 3(2001) 1 CCLR 5.

⁴ S Sime A *Prac5cal Approach to Civil Procedure* Oxford: Oxford University Press (2002):4.

12/4/2005 a counsel can be stopped from appearing against a client who had previously retained him. Such an order may be granted on a simple objection made in open court. Although a criminal matter done in a magistrate court, the case of *The People v Mbiach Francis Nkemabin*⁵ is in point here. Lafon J had in this case correctly ruled in favour of an objection by the opposing counsel that counsel appearing against the defendant could not do so because the counsel's firm had acted for the defendant previously.

It should be stressed that counsel are except in the circumstances stated above (where there is a danger of compromising confidential information) free to appear to do his case without inhibition in all courts in the country. Indeed, it is not the court that counsel is appearing before in a case that confers the power to counsel to practice such that it could from a casual objection hold that the counsel should not appear before it.

*The Procureur General, North West Province v The Cameroon Bar Association Represented by the Cameroon Bar Council & Anor*⁶ has stated this principle very clearly. It was in this case held that "as a general rule, except by way of appeal, no court, judge or magistrate has the power to rehear, review, alter or vary any judgment or order after it has been drawn up, entered or delivered either on an application made in the original matter or in a fresh action brought to review such a judgment". Based on this, an application by the PG North West Province to nullify the court's earlier decision swearing in the 2nd respondent was dismissed on a preliminary objection by the respondent.

The PG's impassioned argument that the 2nd respondent was sworn as an advocate in error was held to be of no moment. This decision is significant for establishing the

⁵ CFIM/P1/12/2011.

⁶ (2000) 1 CCLR 106.

principle that since the advocate is sworn in Cameroon by a judgment of the Court of appeal, a lower court cannot declare an advocate incompetent to appear before it for any reason which occurred after the advocate had been sworn without a full and complete disciplinary sanction by the Bar Council which has been affirmed by the court of appeal that swore the advocate in.

Since the competence of counsel affects the quality of practice in the court, counsel must keep abreast of the law. Mastery of the law and familiarity with the dynamics of legal practice are absolutely essential. The dignity and integrity of the counsel and evolution in practice demands this. Although in the past it was settled that a litigant should not be punished for the sin or mistake of counsel, apart from the embarrassment of relying on this reasoning, mistake of counsel is not a magic wand to use to escape the consequences of ineptitude in legal practice anymore.

The courts will today easily determine a case against a party on the basis of counsel's incompetence. This principle was sufficiently rationalized in *Minister, Federal Capital Territory v Abdullahi*⁷ where it was stated "that there is a world of difference between ineptitude or incompetence of counsel and mistake of counsel." Following this principle, a "counsel who by his own admission does not know the correct position of the law in respect of a given matter" would "hardly be allowed to take refuge under the principle of 'sin of counsel'". Based on this position, the court of appeal categorically postulated the view that: "The litigant who hires an incompetent counsel has to bear the consequences including losing the case. It was thus in the *Abdullahi* case stressed that the above is the position since the client or party is at liberty to change counsel at will once he is not satisfied with the handling or conduct of the case."

⁷ (2010) ALL FWLR 179 see held 7.

Commencements of Civil Actions in the High Courts

Introduction

Litigation is most certainly a complex process which requires proper planning. It is from a practice point of view apparent that the actual taking of evidence and addresses that is done in court is only a fraction of what the circumspect counsel does in the tranquillity of his firm. Indeed, it is clear that in certain cases, the arguments in court rates far less in importance towards the success of the case than the planning and drafting that occurs in the quietude of the lawyer's chambers. Young lawyers often regrettably learn from experience that they ignore this obvious truth at their own peril.

Cause of action

The above reasons make it necessary that before instituting an action in court, the lawyer should as a matter of course take time to seriously consider certain preliminary issues. Clearly, it is of crucial importance for counsel to carefully review the facts as presented by his client who consults him for the first time to ascertain whether the facts presented disclose the existence of a cause of action. Since this is particularly important, what then is cause of action?

A cause of action was defined comprehensively in *Société Nationale D'Electricité Du Cameroon (SONEL) V Vincent Veche* (Trading under the name and style of *Electro-mesches Enterprises*)⁸. It was in this case noted by Njuzu JCA that the

⁸ (2012) 1 CCLR PT 15 1.

notion denotes every fact (though not every piece of evidence) which must be proved if traversed to support his right and the judgment of the court. He went further to cite Lord Diplock MR in *Reeds v Brown*⁹ who regarded a cause of action as simply the factual situation the evidence of which justifies a person to obtain from a court a remedy against another person. It was for this reason, Njuzy JCA observed that Lord Wright held in *Trover & Sons Ltd v Ripstein*¹⁰ that the cause of action in substance are those facts which constitute the essential ingredients of an enforceable right or claim. It needs to be added that based on all these definitions affirmed by Njuzy JCA, any feature or fact in a case as formulated by counsel which diminishes or removes an essential ingredient as indicated in these definitions will led to the conclusion by the courts that a cause of action does not exist. This is exactly why the court of appeal in the Vincent Veche case herein held that the suit did not disclose a cause of action since it had been filed after the 6 years limitation period for instituting actions in contract thus making it statue barred. It is from this decision in- disputable as Lord Dunedin held in *Board of Trade v Cayzer, Invine & Co*¹¹ that the cause of action is indeed that which makes an action possible.

The Société Nationale D'Electricité Du Cameroon (SONEL) V Vincent Veche (Trading under the name and style of Electro-mesches Enterprises)¹² is equally significant for yet another important principle. It was in this case established very categorically that filling a suit after the period statutorily provided for is fatal because the action will be dismissed for being statute barred. The action of the respondent for breach of contract was rejected by the court of appeal in this action since it was brought more than 6 years after it had accrued

⁹ (1888) 2 QBD 128 at 131.

¹⁰ (1944) AC 254 at 263.

¹¹ (1927) AC 610 at 617.

¹² (2012) 1 CCLR PT 15 1.

contrary to the provisions of the statute of limitation 1623. Filing a suit which does not reveal a cause of action is rather a futile exercise because the suit will be dismissed on a preliminary objection.

Next in the order of significance which counsel must avert to is the issue of the locus stand of the client as well as the competence of the court to be approached. An invariable piece of wise advice suggests that it is only when counsel is satisfied that these preliminary issues have been thoroughly reviewed and the right procedural options and dispositions taken that the suit or matter should be filed. These preliminary issues will be dealt with in greater detail in the next chapter.

Modes of Commencement of Civil Actions

Courts are not self-activating here as elsewhere. There are in the context of the practice and procedure of the high courts in the two Anglophone regions in Cameroon four ways of commencing civil actions. These four modes of seizing the competent high court are by writs of summons, originating motions or alternative procedure for claims (part 8 proceedings of the English rules), petitions and motions. It is off-course now settled that the nature of the peculiar cause of action determines the mode of commencement of the action in the courts of records in Anglophone Cameroon as elsewhere.

Writ of Summons

The writ of summons is the traditional mode for the commencement of civil actions in the high courts in the Anglophone regions of Cameroon. The writ of summons is technically a formal document, drawn up and issued by the court stating concisely the nature of the claim the plaintiff has against the defendant. The writ of summon is prescribed by Order 2 rule 2 of the Supreme Court Rules Cap 211 which states that “every suit shall be commenced by a writ of summons signed by a judge, magistrate or other officer

empowered to sign summonses.” It needs in the context of civil practice in the Anglophone courts in Cameroon to be stated that it is not technically a “writ of summons” that the party or counsel wishing to commence an action in the high court of the Anglophone region files in court. On the contrary, what the lawyer prepares and files in court is an “application for a writ of summons”. This practice of preparing and filling an application for a writ of summons is based on the provision of rule 1 of Order 2 of Cap 211 which asserts that the writ is issued “on application”. The application for writ of summons is in form and content so similar to a statement of claim that it might well be described as a mini statement of claim. An application for a writ of summons should as a rule be drafted in a comprehensive fashion and broken into paragraphs each containing a distinct factual feature of the claim. Good practice requires that an application for writ of summons should be drafted with such details that it could subsequently be adopted as the plaintiff’s statement of claim without the time wasting practice of asking for time to file an entire new statement of claim during the adoption of pleadings. The critical question in the context of practice and procedure in the Anglophone regions is whether an application for a writ of summons is in itself a valid process with which a civil suit is in law validly commenced in a high court. This question assumes significance because of the exclusively Cameroonian practice whereby the registry endorses and serves the application for writs of summons on the defence without accompanying them with the actual writ of summons.

In dealing with this rather crucial issue, it may be observed that Order 2 rule 2 of Cap 211 has interestingly noted that a writ of summons is “signed by a judge, magistrate or other officer empowered to sign summonses”. Aguda the celebrated authority and writer conclude that it is “when this is done that

the writ is said to be issued by the court”¹³. While theoretically Aguda may be correct, it seems obvious that an objection in a Cameroonian Anglophone court of record that a filled and served application for a writ of summons is not a writ will be discountenanced and dismissed. The court of appeal has held severally that a party will not be punished for the failings of the registry. In *Pamol Plantation PLC v George Makoge*¹⁴ the Court of Appeal Buea affirmed the rather sound and excellent decision of Evande J of the Meme high court that a party would not be punished for the error of the registry.

Mbeng JCA in affirming the lower court’s judgment held that: “Concerning the issue whether a certificate of entry was issued by the Registrar of the Meme High Court or not, this does not in our view make the Meme High Court incompetent or have anything to do with the Respondent. It is the duty of the Registrar of the Meme High Court to issue a certificate of entry. If he does not do it this cannot be visited on the Respondent who had accomplished his own duties by properly filing the action which was accompanied by a written declaration of intention to prosecute his case.”

Quite clearly, the act of producing and sealing a writ is the exclusive duty of the registry following rule 1 of Order 2 which categorically says so. This being the case, a party who prepares and files his application has done all he is required to do. The court will therefore not punish such a plaintiff for the failings of the registry to do all that the latter is obliged to do before serving the process.

Every action commenced by writ must have a plaintiff and a defendant as the case may be. Under no circumstances may a party appear in the same writ as the plaintiff and defendant at the same time. The writ must bear the name(s) of the

¹³ A Aguda Principles of practice and procedure in civil actions in the high courts of Nigeria Sweet & Maxwell London (1976) 13.

¹⁴ CASWR/L.18/2009 Unreported.

defendant(s) in the appropriate column. The plaintiffs must ensure that the defendant's name is written correctly.

At times a person may sue or be sued in a capacity other than in his or her personal name. Where this is done, that capacity must be expressly disclosed on the face of the writ. Actions brought in representative capacity must expressly state so. It must for instance in an action brought by an administrator of an estate be stated in the writ that he/she sues for himself/herself and on behalf of all other beneficiaries. In *The People of Finge v The People Bambui*¹⁵ both communities were represented by representatives who were explicitly stated in the suit. The claim must also be properly endorsed on the writ which for our specific purpose is the application for a writ. The endorsement of the writ must be concise and unambiguous setting out the facts on which the party relies to substantiate his or her claim. The writ must also bear expressly the addresses of the parties.

Alternative Procedure for Claims

This procedure is contained in the English rules of procedure (White Book Series) part 8. This procedure has in England replaced the originating summons procedure that was previously used. The part 8 procedure initiates proceedings as opposed to interlocutory action. Proceedings for which this procedure is used are those involved in interpretation of questions of law rather than issues of facts.

Actions commenced by the alternative procedure for claims are almost invariably ready once the defendant is served with the claims form and s/he acknowledges service by endorsing on the acknowledgement of service form to which is attached his defence. The alternative proceedings are different from originating summons because there are more expeditious.

¹⁵ 2001) 1 CCLR 117.

Under it, the defendant has a 14 days' timeframe upon which to file his defence.

Alternative procedure or Originating Summons?

Ordinarily, while it is trite that non contentious actions where the facts of a case or matter is not likely to be or, in fact are not in dispute are not to be started by the traditional writ of summons as the latter is ideal only in hostile proceedings,¹⁶ the issue is not settled in Cameroon. The problem in the context of Cameroon is the rather passionate controversy as to whether in such non hostile actions the commencement should be by originating summons or by the more recent approach of the alternative claim procedure. Both contentions are examined here. This controversy was the subject of the dispute in the recent case of *David Nanja Carr v Enow Likowo Esther Carr and 2 others*.¹⁷ The plaintiff in this action had brought an originating summons for the interpretation of the will of one David Carr deceased in the high court of Buea amongst other claims. Counsel for the defendant in the substantive suit raised a preliminary objection *limine litis* on a variety of grounds. It was in particular vigorously contended that the action has been improperly commenced because the rules of the High Court Civil Procedure Rules Cap 211 Laws of Nigeria “do not make provisions for the commencement in our high court by means of originating summons”.

Arguing further, counsel submitted that the English rules “no longer provide for commencement of an action by an originating summons”. It was also the contention of the objectors that the suit which involved the possibility for substantial disputes over facts was not appropriate for originating summons or the alternative procedure in fact.

¹⁶ (See *Amabike v Reg Gen*, CAK (2010) Vol 188 LR CN 85

¹⁷ HCF/0075/AP/08 Unreported.

These issues were considered so fundamental that a full panel of the high court was established to decide on the matters raised.

After noting that the critical issues to be determined were whether originating summons is outdated and whether the part 8 alternative procedure for claims now in use in England was applicable in the Anglophone courts, the judges had no difficulty in finding for the defendant/objectors. It was thus apparent from the categorical pronouncement in the decision of the full panel of the court that the Part 8 alternative procedure for claim is the appropriate method of commencing actions which were previously commenced by the originating summons procedure.

The “originating summons procedure” said Forbang J delivering the panel’s unanimous decision is “a rare practice quite foreign and unknown to the rules applicable in our courts”. This conclusion was according to this judge rationalized on the basis of section 10 of the Southern Cameroons High Court Law 1955 which permitted the High Court to apply the rules of practice and procedure of her majesty’s High Court of England or something in substantial conformity with what for the time being is adopted in England. Based on this reasoning, the full panel plainly adopted the practice in the White Book 2004 Vol 1 of England and held that:

“The part 8, alternative Procedure of claim, shall be suitable for use in situations where previously proceedings were commenced by originating summons. Examples would be declarations as to the construction of documents and question of law etc.” The part 8 therefore replaces in a simplified form the former High Court originating summons procedure.”

However, in spite of what has been stated above, there is an alternative view regarded by many from a practice perspective as a better one. This view continues to insist that the originating procedure is still applicable in the high courts of the Anglophone regions in Cameroon. That the originating procedure still subsists in the high court practice of the region is according to proponents¹⁸ of this contention predicated on a variety of solid reasons.

Firstly, the David Ninja Carr case which is relied upon as the basis for the adoption of the alternative procedure is a high court precedent. It is quite plainly obvious that this decision cannot be considered as binding precedent in other high courts of coordinate jurisdiction. Although courts do not lightly disregard the decisions of other courts of coordinate jurisdiction, they nevertheless remain at liberty to do so. The high courts in the region can for this reason legitimately hear and determine cases brought pursuant to the originating summons regardless of the full panel's decision in the David Ninja Carr case.

Besides, an unassailable reason for the view that the originating summons still applies in the high courts of Anglophone Cameroon is the fact that the David Ninja Carr case is based on a rather tenuous foundation. Section 10 of the Southern Cameroon High Courts Law 1955 upon which it is based has been significantly attenuated by the 1972 and 1989 laws on judicial organization. These laws which are largely composite legislations combining substantive and adjectival principles of law created an entirely different practice regime peculiar to Cameroon.

Following this view, the originating summons which had become a common practice was saved and retained by these legislations in their own rights as national laws. This view in our opinion receives support from the authoritative

¹⁸ The author shares this conviction as well.

pronouncement of Fonkwe JCA as he then was in *The Liquidator, National Produce Marketing Board (N.P.M.B) v Egbe Stephen Batuo*¹⁹ who stated quite clearly that the courts can and often rely on practice which they have developed over time. The practice of the originating summons in Cameroon may have had its early origin in England, but it later evolved as a practice developed by the courts as independent institutions over decades in terms of Fonkwe JCA's view above. There is no basis to abandon them simply because the courts in England have evolved out of them. This denial of our judicial independence in favour of foreign subservience as suggested in the *David Ninja Carr* case is completely untenable for the additional reason that our local legal realities are not comparable to those that made the alternative claim procedure in England inevitable.

It may be observed in this light that Law No 2006/015 of 29th of December, 2006 on Judicial Organization the current law on judicial organization which is also a composite legislation has put the issue beyond any dispute. Section 34 of this law saved practice and procedure adopted in the past in the event where the 2006 Law is silent. Since the 2006 law is silent on the practice of originating summons, it follows naturally that the "practice of originating summons" applicable in the high court before the coming into effect of the Act has to be adopted and maintained. Section 34 of the 2006 Law is an independent provision, which must necessarily take precedence over Section 10 of the Southern Cameroon High Court Law 1955. The practice of the high courts in hearing cases through the originating summons which had been in existence in our courts continues in our courts by virtue of Section 34. It may be observed that High courts have initiated and maintained certain practices which are not expressly contained in the rules of court Cap 211. The practice of not formerly preparing and

¹⁹ *Supra*.

issuing a writ of summons in actions commenced by writ in spite of the provisions of Order 2 is a good case in point. Today, an application for a writ of summons in the High Court and statement of claim in a magistrate court are by practice regarded as the writ of summons and served on the defence as such. It will certainly be futile to argue that there are not valid ways of commencing civil proceedings. This controversy aside, the high courts have the undoubted competence to nullify a deed of conveyance purporting to transfer title over unregistered land if its interpretative jurisdiction is invoked either by an Alternative Procedure or Originating Summons as the case may be. It was held by the High court Buea in *Jonathan Agwe Ndaa v Etah Enow Moses & Anor*²⁰ that it has powers to interpret and determine the validity or otherwise of the deed in such circumstances while noting that this would not amount to deciding the issue of who owns the land in violation of section 5(3) of the 1983 law. In the case herein, the 1st defendant purported to have bought a piece of unregistered land under a deed drawn up by the 2nd defendant a counsel. The deed was signed by an agent of the vendor who purported to have been given a power of attorney by the original owner resident in the United States of America to sell it. The land consultative board Buea had held on the basis of this deed and power of attorney that the land was validly sold and therefore owned by the 1st defendant. Based on these facts, the high court did not hesitate in holding that the deed under consideration was void under section 8(2) of Ordinance No 74-1 of 6th July, 1974 because the land was unregistered.

Dealing with the power of attorney, the court held that the power was void because sections 79 and 164 of the registration, stamp duty and trusteeship code require that deeds and instruments must be stamp dutied. Given that the power was not stamp dutied and notarized, the court relied on section

²⁰ HCF/00181/AP/08 Unreported.

195 of this code to hold that it was forbidding to deliver a decision on the basis of this unregistered power. The court's decision was also based on Lord Denning's celebrated decision in *UAC v Macfoy*²¹ cited by the court of appeal *Buea in Meridian Bank Cameroon v Albert Niba Che*²² that when an act is void then it is in law a nullity with the result that any proceedings which is founded on it is incurably bad. Such a void act cannot confer an interest recognizable by a court.

The same court had on an AP declared a deed purporting to transfer land by a person who was not an administrator or executor of the estate of which the land forms part in. The court of Appeal had in the administrator of the estate of *Sylvester K Kilo* (by his attorney *Judith K Kilo*)²³ v *Cres Y Kilo & Anor* declared a deed null and void and of no effect whatsoever because the defendant who purported to make it did not have letters. Indeed, the 2nd defendant the ministry of state property was ordered to cancel any land certificate issued on the basis of such a void deed. Justice Forbang must be applauded for these bold and just decisions in the face of the prevailing tendency towards unscrupulous acts in land matters.

Commencing Probate Actions

A Probate proceeding is significantly different from other civil actions in the court of records. Their commencements are also different. There are basically two types of administration in the event of death. There is probate or administration with will annexed and administration without will. While the former is called testate succession, the latter is known as intestate succession. Both types of administration have distinct forms of commencement. Normally, on the death of a person intestate without a will, anyone who conceives that he is entitled to be his administrator makes an application for a grant of letters of

²¹ (1961) 3 W L R 1405.

²² CASWP/4/92.

²³ HCF/0152/AP/06-07 Unreported.

administration. The party interested in obtaining grant of Letters is required to make the application to the Administrator General of the Probate Division, who by virtue of section 10 and 15 of SCHCL 1955 is the president of the High Court. It must be stressed that this application does not in law amount to the commencement of a probate action.

Once such an application is made, the party is referred to as the applicant for grant. The probate clerk enters the application in a special register for that purpose, and publishes the application. The purpose for such publication is to give notice to anyone who wishes to challenge the grant. In the event where the grant is not challenged-usually within a period of 30 days, the Administrator General proceeds to seal the grant, in the presence of witnesses. Where the grant is challenged, the person challenging the grant is referred to as the caveator. In opposing the grant, the caveator is expected to file a caveat, within 30 days upon publication.

The applicant for grant is notified with the caveat. Upon receipt of the caveat, the applicant for grant is expected to file a warning to the caveator. In the warning the caveator is requested to file an Affidavit of Interest within 7 days stating the interest he has in the estate of the deceased. Upon receipt of the said Affidavit of interest, the applicant for grant is expected to file a writ of summons in which the parties – applicant for grant and caveator becomes plaintiff and defendant respectively. It is only at this stage that a probate action is said to commence.

Revocation-procedure

Upon grant of probate, an interested party may challenge such a grant. He is required to seize the court for a revocation. The party applying for revocation is made the plaintiff, while holder of the letters is known as the defendant. A Probate action must be begun by a writ of summons issued out of the Probate registry. The writ, before being issued, must be

indorsed with a statement giving the nature of the interest of the plaintiff and the defendant in the estate concerned in the action. Once an action for revocation is taken out the probate or Letters of Administration must be lodged with the court. This must be done seven days upon the commencement. If they are held by the person commencing the action, and within fourteen days by any of the defendants who has them in his possession. A person who does not comply with these provisions may be compelled to do so by order of the court. All persons entitled or claiming to be entitled to the estate of deceased person under an unrevoked grant of probate or Letters of Administration shall be made parties to any action for the revocation of that grant. After hearing, the court requires the revoked grant to be produced and delivered to the registrar for cancellation.

Motions

There are certain species of proceedings which are exclusively commenced by motions. The prerogative writs of certiorari, mandamus and prohibitions are commenced by motions in the high courts in the region as elsewhere. Quite apart from the fact that this procedure of commencement has crystallized from the practice of the courts over time, this mode of commencement of civil action is statutorily recognized in the country.

Indeed, section 18(1) (c) of Law No 2006/15 of 29/2006 gives the high court jurisdiction to:

1. Hear and determine applications for an order prohibiting any person(s) or authority from doing or performing any act in respect of which he is not entitled or competent to do by law.
2. Hear and determine all applications for an order commanding any person(s) or authority to do or perform any act which he is required to do by law (mandamus). Obi

Okoye²⁴ has noted that a person desirous to obtain an order of certiorari, prohibition or mandamus “shall first apply ex parte for and obtain leave to apply for the order”. Yet, the situation in Cameroon is different because the provisions of section 18(1) (c) above has in plain language simply permitted the matters indicated in them to be commenced by application. The fact that the provision makes reference to “application” simpliciter is significant in the context of the Anglophone region. It is thus obvious that there is no basis to suggest that the action for the prerogative writs of mandamus and prohibition must as is the case in Nigeria be commenced by first filling an ex parte motion for leave. The commencement by motion on notice (as is the usual practice) of all of the aforementioned processes is perfectly correct for being consistent with the plain grammatical meaning of this provision.

Besides, the court of appeal Bamenda had in *Mbu Mbi Kangsen & 2 others v Ado Mama Mohamadu*²⁵ held that it is possible to commence an action by motion even in cases where in Nigeria and England this could not be done. Relying on sections (16) (d) and (5) (b) of Law No 89/019/29/12/89 which are similar in intent and purpose to section 18(1) (c) of the 2006 judicial organization law, it was held that the action by the respondent by motion to order the appellant to remove his fence which was obstructing the respondent’s cattle from accessing a water point was validly brought by motion without an intervening substantive suit. Although this decision was based on the interpretation of a provision of the 1989 Judicial Organization Law, the principle remains valid under the current dispensation dealing with applications as well.

In fact it is indisputable that certain claims under the peculiar system operating in Anglophone Cameroon are

²⁴ A Obi Okoye Essays on Civil Procedure Vol 3 Forth Dimension Publishers (1979) 12

²⁵ (2001) 1 CCLR 76.

unknown in England and Nigeria and therefore not amenable to commencement procedures cognizable under the rules of the latter. It is for this reason that it was in *The Liquidator, National Produce Marketing Board (NPMB) v Egbe S Batuo*²⁶ stated by Fonkwe JCA as he then was that certain claims like the ones of taxation of bailiff fees take their root in French Civil law where the concept emerged. Noting that these types of claims are under French law commenced by “*ordonnance sur requêtes*” which he interpreted as motions, the judge held that such claims are countrywide started by motions. Based on this, the court of appeal dismissed the appellant’s argument that the respondent ought to have commenced his action in the lower court by writ of summons.

It should be stressed that in all such applications the burden is on the applicant to establish by affidavit evidence and exhibits attached that he is entitled to the relief sought. An order of prohibition may be granted where the court is convinced the body against which it is directed is violating the rules of natural justice of the applicant or is engaged in a patent infringement of the law to the applicant’s prejudice. A mandamus on the other hand issues to compel the performance of a duty fixed by law as expressly stated by section 18(1) (c) of the Judicial Organisation Law 2006. It was held in *Ex parte Cherubim and Seraphim*²⁷ that although a mandamus will not lie to compel the exercise of discretion, if it is shown that the body or official was influenced by extraneous matters in exercising the discretion a mandamus will compel the body or official to determine the matter in accordance with law.

The prerogative writ of certiorari it has to be emphasized does not lie against a magistrate court in the courts of Anglophone Cameroon. The substantive laws that designate

²⁶ (2001) 2 CCLR 185

²⁷ (1960) L L R 129

and confer jurisdiction on the courts do not allow this. It was thus held in *The Liquidator, National Produce Marketing Board (N.P.M.B) V Egbe Stephen Batuo*²⁸ that both courts of First Instance (magistrate court) and the high court are courts of original jurisdiction with- out one having over- riding jurisdiction over the other. Relying on article 16 of Law 89/019/29/12/89 which is similar to section 18(1) of 2006 judicial organization Law Fonkwe JCA held that:

It is therefore very misconceived for appellant to argue that through the certiorari order the high court should exercise supervisory jurisdiction over the inferior court of First Instance in Kumba

Noting that the above argument was based on an error, the judge affirmed that the high court does not only lack that jurisdiction but could not materially restrain the trial magistrate from hearing a suit that had already commenced. To argue as counsel did was dismissed by the court of appeal as a product of confusion with regards to the powers of a high court in Cameroon and that of England.

Petitions

Certain actions are by their very nature to be commenced by petitions. Matrimonial and divorce proceedings are traditionally begun by petitions which in substance are similar to statements of claim. The difference between the two is the rather technical one that while the paragraphs in a petition are started by “that” this is not generally the case with an application for the writ of summons. Besides, section 18(1) of the Judicial Organization Law 2006 specifically requires certain administrative actions to be commenced by petitions. Election matters are typically commenced by petitions but this has not

²⁸ (2001) 2 CCLR 185

been dealt with here in any detail because election petitions are determined by the Supreme Court which adopts a purely civil law procedure.

Commencement of Labour Actions

The procedure for the initiation of a labour action has been set out in section 138-141 of the Labour Code. It is worth noting that although a labour matter is civil in character, its mode of commencement is unlike what obtains in other regular civil suits. Labour actions are different from civil actions particularly because of their distinctive features with regards to filing, pleadings, etc. Labour actions are by s.138 (1) of the code commenced free of charge. Neither the registry of the relevant court or the labour inspectorate may demand payment for initiating a labour proceeding for the settlement of a labour dispute.

This provision is salutary when seen in contradistinction to the practice in regular civil actions. In the latter, the plaintiff has to pay high filing fees in addition to 5 percent prospective tax on the value of the claim of the plaintiff²⁹. Unlike in regular civil actions where government has used exorbitant filing fees and prohibitive pre-filing taxation of 5% of claims to impede access to the courts by the poor, S. 138 (1) of the labour code has liberalized conditions for accessing the courts in labour actions.

An individual labour dispute is the classical dispute involving a worker and his employer. This could take a variety of forms ranging from a straightforward failure to pay wages, to a complaint of a worker over the outright wrongful termination of the employment relationship. Section 138(1) of the Labour Code has clearly set out the procedure to be

²⁹ See *Meme Lawyers Association v The Registrar High Court Kumba*. Lawyers laudable attempt to stop this undemocratic restriction of access to the courts was defeated by the court of Appeal Buea which ruled that the practice that places tax above justice was good.

adopted in resolving individual labour actions which must be followed. Under this provision, all such labour disputes must first be brought before the labour inspector in the place of employment of the parties. The labour inspector is by section 139(1) vested with the duty to attempt a resolution of the problem.

On a complaint by either party, the inspector invites the protagonist to his office for an amicable resolution of the dispute. Often, there are three possibilities. It could happen that the parties amicably resolve their dispute completely, partially or fail to agree on all the points of their disagreement. In either situation, the labour inspector shall prepare a statement of conciliation, partial conciliation and non-conciliation respectively. Although these statements ought to be signed by the parties, it was held in the *Ken Enroy* case that a statement of non-conciliation can legally be issued in default where one of the parties fail to sign it³⁰.

An individual labour action actually commences when a diligent party fills a statement of partial or non-conciliation at the registry of the relevant court. The action takes off after the party makes the relevant oral declaration before the registrar that he desires that the case be heard. A worker cannot circumvent this procedure by taking his action to court without the intervention of a labour inspector. This is so as the Supreme Court had held in *Affaire Maître Penda C/ Evini*³¹ Joseph that the attempt at reconciliation is obligatory in all labour matters. The court held that this principle is fundamental while noting that its violation involving an attempt to hear a part of a claim which did not form part of the integral part of a claimant's complaint before the inspector of labour is a legal nullity. It is from this case evident that new

³⁰ An earlier decision in *Felix Ekengo v Tiko Soap* suggesting that a statement of non-conciliation which has not been signed by one of the parties was invalid is clearly delivered *per incuriam*.

³¹ Arrêt No 32/s of 21/1/82.

issues may not be introduced by an amendment in a labour court without first re-transmitting the file back to the labour inspector.

What if the labour inspector fails to prepare the relevant statement with which the case may be commenced? Section 16 of the Law on Judicial Organisation 2006 has unlike the 1989 Ordinance on Judicial Organisation made provisions for a party to compel anyone vested with a duty to perform the said duty. Based on the above, the obligation of the labour inspector to attempt conciliation clearly creates a duty for him to prepare the relevant statements of either conciliation or non-conciliation as the case may be.

It was for this reason that the Meme High Court had no difficulty issuing a mandamus in *Abaken v Labour Inspector Kumba & Anor*³² compelling the inspector to prepare a statement of partial conciliation for the worker to commence his action. In this case, a worker who had accepted the payment of a sum in full satisfaction of his claim against the marketing board later changed his mind after consulting a counsel. His subsequent request that the statement of conciliation be changed to that of partial conciliation was opposed by the labour inspector. The inspector had refused to do so in spite of all entreaties insisting that he was at liberty to decide on what to do.

Irregularity in the commencement of action

Counsel or the parties do sometimes make mistakes in the course of commencing their case including in certain situations that torching on the drafting of the case. When this happens, it behoves on the defence to timeously raise an objection on the basis of the error made. This is so since non-compliance with the rules of court is deemed to be waived once the party

³² Suit No HCF/L.8/84. An unreported decision of the Kumba High court which was subsequently confirmed on appeal to the Supreme Court

entitled to complain about the breach takes further steps in the proceedings where the non-compliance amounts to mere irregularities. A non-compliance or error which is fundamental like filling a case in a court without jurisdiction or without the fulfilment of a condition precedent is fatal because it will result in the striking out of the case.

The civil part of the claim in *The People v Thio Thomas Finjap Anthony*³³ illustrates the attitude of the courts to irregularities in the commencement of actions as well the view that the courts will not allow the existence of mere irregularities to deflect them from doing substantial justice. It was in this action argued in the court of appeal Buea that a motion for restitution of a car impounded by the police was wrongly heard and granted by Justice Anjorin. Counsel contended that the motion for restitution was captioned “In the High Court of Fako Division” instead of as “In the Chambers of The Examining Magistrate of the High Court of Fako Division”. Based on this contention, counsel submitted that the order releasing the car was wrong and should be declared a nullity.

Dismissing this argument, the court of appeal held that the error was an irregularity describing the contention as amounting to an attempt to rely on technicalities at the expense of the substantial justice of the case. It was also held that it is not the use of a caption that confers jurisdiction on the high court but rather the substance of the case. Crucially, the court of appeal held that the use of the wrong caption was not challenged timeously in the lower court and has not been shown to cause injustice to the appellant. This case must be contrasted with cases in which the issue raised about the court is substantial.

The latter situation was demonstrated in the case of *Fon Doh Gwanyi & 9 others v The People*³⁴. Here, after defining a

³³ Suit No CASWR/8M/CR/2009.

³⁴ (2012) 1 CCLR 46.

court as “a governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice”, the court of appeal Bamenda held that where the court is wrongly constituted it will lack the competence to hear cases.

Relying on the Cameroonian Supreme Court decision in *Cameroon Shipping Lines S.A v Njeh Nee Anya Moses*³⁵ which held that “a judgment of a high court delivered by a magistrate who is not a member of the said court is null and void on ground of public policy for failure to respect the law on the composition of the trial court”, Nko JCA declared the trial of the appellants in the high court a nullity because one of the judges in the panel was a judge of the court of appeal.³⁶

³⁵ Arrêt No 55/S of 18/12/2003.

³⁶ Some have contended that assigning a court of appeal judge to the high court panel was a deliberate manipulation by the government to rescue Fon Doh Gwanyi who is a CPDM heavy weight.

Jurisdiction

It is from a procedural point of view absolutely essential for counsel to carefully review the facts and instructions given by a client with the view to ascertaining the court with jurisdiction in the matter. In doing so, it has to be borne in mind that jurisdiction is a function of the territorial, subject matter and monetary value of the claim competences of the court. After making reference to the above conclusion, it was held in *Societe Camerounaise De Transformation Metallique (SCTM) & Anor v Nchanji C Maurice*³⁷ that jurisdiction for a court to entertain a matter or decide it is conferred by statute, charter or commission under which the court is constituted and may be extended or limited by similar means. Nana JCA noted in this case that “in our Anglophone legal system jurisdiction of the high court in civil matter is governed by section 7 of the Southern Cameroon High Court Law 1955,” Order VII rule 4 of Cap 211 and section 18(1) (b) of Law No 2006 on judicial organization”. He concluded that under these legislations jurisdiction concerns three aspects viz the subject-matter, the amount involved and the place of trial.

It is because of this necessary that counsel from the onset ensure that the pleadings are drafted or affidavit deposed such that it will plainly show that the court in which the cause has been filed has these three competences as identified in the above case. This is an inflexible rule flowing from the Cameroonian Supreme Court decision in *Ngon Bernadette v Tom Francois*³⁸ which in substance held that filing an action in a wrong court is fatal irrespective of the merits of the

³⁷ (2012) 1 CCLR 77.

³⁸ Case No 166/CC/ of 07/12/1999 Unreported.

substantive action since such a court lacks the competence to hear the matter. Of serious importance though not stated expressly is the fact that the subject-matter and value of claim aspect must exist in a suit for the court to have jurisdiction. Clearly, the court does have jurisdiction to hear a case even where it falls outside its territorial competence once one of the defendants is resident or doing business within the territorial limits of the court under Order VII rule 4 as was held in the Nchanji Maurice's³⁹ case.

The issue of jurisdiction is from the Ngon Bernadette case above so foundational that the Bamenda Court of Appeal held in *Alhaji Amu v Acho Daniel & Others*⁴⁰ that it could be raised at whatever stage of the proceedings that it is discovered including on appeal even at the Supreme Court. Indeed, it really does not matter if the parties do not raise the issue of jurisdiction themselves since Njuzy JCA had held in *Société Nationale D'Electricité Du Cameroon (SONEL) v Vincent Veche* (Trading under the name and style of *Electro-mesches Enterprises*)⁴¹ that “a judge seized of a matter must determine whether or not he has the jurisdiction to entertain the suit” noting pointedly that “it is not necessary that it must be raised by a party.”

The issue of jurisdiction was graphically illustrated in the SAGA Cameroon case. In the case, the plaintiffs averred in their statement of claim that the defendants were resident and carrying on their business in Douala without stating where the contract of carriage was made. On the defendant/appellant's preliminary objection that the Bamenda High Court did not have jurisdiction to hear the matter, the Court of Appeal Bamenda held reversing the trial court that on the state of the pleadings it was the Douala High court that had jurisdiction. Bawak JCA as he then was relied on Order 7 rules 3 & 4 High

³⁹ (2012) 1 CCLR 77.

⁴⁰ (2001) 2 CCLR 204.

⁴¹ (2012) 1 CCLR PT 15 1.

Court Rules Cap 211 and held that the jurisdiction of the Bamenda High Court was excluded on the basis that suits for the specific performance of contracts must be commenced at the place of the performance of the contract or the jurisdiction where the defendant resides. The attempt by the defendant's counsel to introduce evidence of the fact that the contract was executed in Bamenda in his written submission was rejected for two reasons. Counsel was criticised for relying on his submission "as if that submission was evidence before the court". Secondly, the court of appeal pointed out that "even if that were evidence properly given, such evidence ought not to be admitted on the ground that it was not pleaded" noting that the "failure to plead the place where the contract was made was fatal".

Jurisdiction over administrative Acts: A procedural perspective

An important procedural question to be asked here is that dealing with whether the regular high court in the Anglophone courts has jurisdiction to determine disputes which are administrative in character. This question is vital because of the controversy associated with this issue in the face of the attempt by a dominant executive arm of government to swamp the common law in favour of the more dictatorial civil law principle which potentially accommodates administrators and big state officials.

The mere fact that an act is administrative is not conclusive that disputes relating to it must invariably come within the jurisdictional competence of the administrative bench of the Supreme Court such as to exclude the ordinary courts from determining it. This issue should be handled with circumspection as Kamto had noted that the issue is a delicate procedural matter because "the defining line to determining between the competence of the ordinary law court and the

administrative court are often times delicate” with the result that counsel often fall into error. However, both Article 9(3) (c) of Ordinance No 7/6/26/8/72 fixing the organization of the Supreme Court and the spirit of section 18 of the 2006 law on judicial organization does not admit of the simplistic interpretation that once the wrongful act was done by an administrator the high courts have no competence to determine disputes and matters emanating from such acts.

In challenges with administrative elements, the regular courts are expected to critically examine the facts of the dispute to ensure that their jurisdiction is excluded. In doing so, attention must be had to the basic principle regulating this domain of French administrative law as enunciated in a long line of cases. A recommended approach is for the administrative act to be first characterised into “faute de service” and a “faute personnelle” as was done by Morfaw JCA in *James Akum v Tchoussongou Augustin*. This distinction when correctly drawn has been shown to facilitate the determination of the question of whether the ordinary courts will have jurisdiction.

It was in the celebrated Supreme Court case of *Mve Ndonga & Anor v Ngaba Victor*⁴² and the equally important case of the North West Court of Appeal decision of Chief of Service Price Control North West Province & Anor v Zachary A Tataw⁴³ held that a public officer ceases to act administratively if his acts are contrary to law or illegal. Based on the above principle, it is clear that illegal acts which are contrary to law cannot be regarded as “faute de service” coming under the jurisdictional competence of the Supreme Court. It was for this reason held in the *James A Akum* case quite clearly that:

⁴² SC/17/10/68.

⁴³ BCA/4/77 Unreported.

“the act of the respondent though an administrative act constituted not a “faute de service” as the learned trial judge erroneously held but a “faute personnelle” which according to L Neville Brown and G F Gandneris a fault that is linked to the public service but reveals its author with his weakness, and his passion and imprudence. We are therefore in accord with learned counsel for the appellant that the act of the appellant was malicious and patently arbitrary”

Following the above findings, Morfaw JCA had no difficulty in concluding that the act of the respondent a district officer who maliciously destroyed the appellant’s fence fell “not within the jurisdiction of the administrative bench” but squarely under section 9(3) (c) of Ordinance No 7/6 fixing the functioning of the Supreme Court which made such acts determinable by the ordinary courts.

It has at other times been argued that another way of dealing with this issue is to say that where the administrative act amounts to what is in French law characterised as “voie de fait”, the ordinary courts will have jurisdiction. What then is “voie de fait”? Ngassa J of the High Court Buea in an articulate judgment in *Jesco Manga Williams v The Fako Land Expropriation Commission* represented by its chairman the SDO for Fako Division & Anor describes it as “acts that are so manifestly irregular that they lose their administrative nature or character.” This definition conduces with that involved in the classification of administrative acts into the two types of fautes identified by Morfaw JCA earlier.

Indeed, citing the same authority Ngassa J noted in the *Jesco Manga Williams* case that the “voie de fait” in administrative context “indicates some irregularity on the part of the administration which is so flagrant and gross that it cannot be regarded as an administrative act at all but is traced as if it were the act of the private body thereby losing the

principle of being adjudicated by the administrative court.” However, neither this case nor *Kampto* has indicated the degree of grossness that will make an administrative act to lose its administrative nature and thus confer jurisdiction on the ordinary courts. Yet it is certain from the position of the Supreme Court in the *Mve Ndong* case that a complete illegality cannot under any stretch of imagination be considered an administrative act that is cognisable by the administrative bench. It will indeed be strange to take the view that a patently unlawful act is administrative.

In *Evarest Agu v Henry Nkangasso*⁴⁴ the plaintiff a man of Nigerian parentage born in Limbe was accosted by immigration officials who demanded to see his resident permit. He gave them the receipt of the payment of the resident permit since the original had not been issued from Yaoundé. The officers pocketed the receipt and demanded for a bribe of ten thousand francs. Unable to pay, the officers arrested the plaintiff and took him to Buea where the defendant ordered his detention for three days.

On being released he got back to Limbe to discover that his truck which he was using when he was arrested had been stolen where the immigration officials callously abandoned it. On his suit for wrongful arrests and detention in the high court Buea, the defendant argued that their act was administrative since the plaintiff was arrested and detained in the course of their duty of doing immigration control. However, *Batuo J* as he then was held that an arrest accompanied with a demand for bribe cannot be an administrative act that will oust the jurisdiction of the high court. He thus found the defendant liable for wrongful arrest and detention and awarded the sum of 400,000FRS damages against him personally and not as commissioner of immigration.

⁴⁴Unreported judgment of Buea High Court in which the author was counsel for the plaintiff.

Jurisdiction and Condition Precedent

Jurisdiction may be affected by certain features some of which may not be intrinsic to the substantive matter. The critical issue of whether any existing condition precedent before the filling of the case has been fulfilled should be considered and dealt with early because this feature may affect the exercise of jurisdiction by the court. The filling of an action without the fulfilment of a condition precedent is fatal since on the broad authority of *Nkeng Phillip Fonju v Atemkeng George*⁴⁵ the court would not have the jurisdiction to hear such an action. It is thus imperative that the lawyer considers whether there is a condition precedent which must be complied with prior to the commencement of the proposed suit. This is so because it is an elementary principle of law that a suit commenced without the satisfaction of a statutorily prescribed condition precedent is incompetent and will be struck out.

Although it is neither possible nor even advisable to exhaustively identify such conditions in this book, a few examples are discussed here. All rent actions in both the high court and magistrate courts must be commenced only after the relevant statutory “quit notices” and “notice to recover possession” has been issued to the tenant potential defendant. The court of appeal endorsed this sound point of principle in *Barrister Bonu Innocent (Doing business under the name and style Galaxy Snack Bar) v Cameroon Printing & Publishing Company Private Ltd Company (CP & PC Ltd)*⁴⁶.

The Buea Court of Appeal here noted that a commercial lease of property can under Article 83 of the OHADA Uniform Act only be terminated after a mandatory notice of six months have been given to the tenant. Counsel for the appellant rightly argued that since this had not been done

⁴⁵ (2009) 1 CCLR 45.

⁴⁶ Suit No CASWP/73/2007 Unreported.

before the commencement of the action to recover the possession of the property the subject of the case, the action should be dismissed. Although the court tacitly acknowledged this contention as it must, the submission did not unfortunately help the appellant since by resting their case at the trial court they could not at the court of appeal establish that no such notice had been given.

A second example of the principle that the non-fulfilment of a condition precedent would be fatal for the action commenced is presented at the level of the court of appeal. It was thus held in *Namodo Emilia v Enanga Rebecca Ikome* that the commencement of an appeal against an interlocutory ruling without first obtaining leave of court renders the appeal grossly incompetent with the result that it must be struck out. Finally on this point, it is clear that an action for the payment of compensation for expropriation of property including the destruction of crops may only come to the ordinary court (court of first instance) after the fulfilment of certain conditions precedent.

By law No 74-3 of 6/7/74 as amended by law No 85/9//4/7/85 claims for compensation can only be determined in the ordinary court as was stated in the *Jesco Manga Williams* case where:

- The claim has been submitted by the prefect of the division to the commission under article 4 for assessment and fixing of the amount. (The plaintiff can by mandamus compel an unwilling prefect to do so)
- One month after the minister of land to whom the report of the commission must be referred has notified the dispossessed plaintiff of the rejection of the claim.

It goes without saying that a defendant who is brought to court in an action in which a condition precedent has not been fulfilled can get the action thrown out on a preliminary objection without the necessity of a time consuming trial as

was the case in the Jesco Manga Williams case. This may in certain circumstances however not be fatal as the plaintiff could still access the court after fulfilling the condition precedent as was held in the case under reference.

In cases over land without land certificates it is plain that the regular courts do not have competence to determine disputes relating to title. Such disputes are by the provisions of section 5(3) of Law No 19 of 26th November, 1983 under the jurisdiction of the land consultative board which is not a court. The board was in *Frida Sirri v John Milla*⁴⁷ described as a mere consultative organ set up to give advice and make recommendations for the minister of land. Although an administrative body, the regular courts will have jurisdiction to quash its acts where the acts are patent illegalities under the Mve Ndong principle discussed earlier. Furthermore, it was held in *Becky Rebecca Oweh v Mmua Njoh Timothy (Njie JCA)*⁴⁸ that the fact that a defendant raised a defence that he owns the land in a trespass action over unregistered land does not necessarily mean the court should decline jurisdiction. A certificate of title or decision of the Land Board should be shown. Where possession is in one person the court should hear the matter on trespass. It has also been held that a perpetual injunction can be issued where the title of either of the parties in the action has been permanently resolved in *Njoh Ewangi v Egbe & Zachria*⁴⁹.

⁴⁷ App No BCA/25.L/79.

⁴⁸ Suit No. CASWP/61/2006-unreported.

⁴⁹ Suit No. CASWP/26/2005.

Actions Brought Under the Simplified Recovery Procedures Measures of Enforcement of the OHADA Uniform Act.

Introduction

The OHADA Uniform Acts have made significant intrusions into the legal system followed in the high courts in Anglophone Cameroon. Although the constitutionality of these laws has been challenged by some, the laws are in practice being applied by the courts in the country. It is imperative to devote some time to the procedure the Uniform Acts have introduced into high court practice in the Anglophone region. This effort is however limited in this book to the procedure for the commencement of actions for debts and the recovery of property under the OHADA regime in the high court.

Under the common law, where a debtor either fails or is slow in paying a debt, the creditor who chooses to go to court to recover the money will have two choices. The creditor may issue a writ of *summons* or proceed through the undefended list action under Order 3 of the High Court Rules Cap 211. However, it is now certain that a creditor can no longer adopt the undefended list procedure to pursue a business debt which is either uncontested or incontestable by the defence from when the OHADA laws became operational in Cameroon.

Recovery of debt or Property

The current procedure for a creditor who wishes to claim payment and or the delivery of an object under the OHADA dispensation is to adopt the simplified procedure method. To qualify for the simplified recovery procedure counsel must

ensure that the claim falls within the scope of Article 1 and 2 of the Uniform Acts. It is important to indicate that although the undefended list action was the nearest common law equivalent of the simplified procedure, the two are not coterminous. Indeed, it has been held by Asuagbor C.J.⁵⁰ in the *Telcar Cocoa Ltd v Agwu Joseph Kalu*⁵¹ case that the OHADA Acts “has completely revolutionized civil procedure in relation to recovery and enforcement of civil and commercial debts.”

Before dealing with the actual procedure and practice for the simplified procedure in the Anglophone courts, it is worth noting that Asuagbor C.J. was perfectly right when she held in the case under reference that the undefended list procedure is both obsolete and limited in scope. Admittedly, the undefended list like the simplified procedure both ensure that actions for these species of debts are promptly disposed of by the use of a writ of summons and an affidavit. The affidavit states facts that show that in the opinion of the creditor, the debtor will have no answer to the claim and that judgment should be entered for the creditor in line with the writ of summons.

In the undefended list procedure, the basis for taking this action is usually stated in the affidavit. If the debtor has no defence to the action, judgment is entered for the creditor in line with the writ of summons. If the debtor however wishes to contest the claim, the only manner that this is done is by filing a counter affidavit. Where the court feels that the debt is contested and cannot be disposed of by the method of the undefended list, the matter will be transferred to the general cause list. The process of a complete trial will then have to be embarked upon.

The above review certainly shows the similarity between both the undefended list action and simplified procedure

⁵⁰ (Supra).

⁵¹ (2010) 1 CCLR 36.

claims. However, as indicated in the Telcar Cocoa Ltd's case, the simplified claim has important points of differences from actions under the undefended list. With the former, Article 1 & 2 of the Act insist that the debt must be from a commercial transaction before the simplified procedure rules are adopted. A friendly non-business loan that has been acknowledged may be liquidated and uncontested yet not amenable to the simplified procedure approach. Besides, the undefended list action does not on the other hand contemplate what has rightly been described as "the arguably more innovative order to deliver or return an object" as does the simplified procedure claim.

The Uniform Act on simplified procedure which was issued on the 10th April 1998 replacing the undefended list system brought in significant innovations in the area of civil procedure related to the recovery and enforcement procedure measures. The law lays down two basic procedures viz:

- 1) The recovery of monetary claims.
- 2) The more innovative procedure for the recovery of property.

Recovery of Monetary Claims

It was in the Telcar Cocoa Ltd case affirmed that in order for a creditor to recover money under this procedure, the following conditions must be satisfied:

- i) The debt must be certain; it must be liquid and must be due.
- ii) The debt must be a contractual debt or arising out of the issuance or acceptance of any negotiable instrument for which there is insufficient cover.

The same Telcar Cocoa Ltd case held without mincing words that these conditions must be established in an affidavit accompanying the motion *ex parte* for an order nisi for the payment of the sum. Apart from identifying the above practice in this peculiar procedure, Asuagbor C. J. in the Telcar case

rather illuminatingly insisted that “the unquestionable nature of the debt can be established through exhibits like receipts or correspondences between the parties.” Leaving nothing to chance the learned CJ added that “where the debt is evidenced in a judgment it must be established that the judgment is final”. This case is also authority that whatever form the debt takes it must be due not contingent on anything.

As the CJ rightly pointed out in *Telcar Cocoa Ltd v Agwu Joseph Kalu*⁵² which has become the locus classicus in this province of the law, the motion *ex parte* must under pain of inadmissibility contain the full names, professions and residence of the parties or for corporate bodies their legal form, name and registered office. It was also held that the application must contain:

“an indication of the exact amount of claim and an account of different components of the debt as well as the basis. All documents shall be in original or certified true copies”

Based on the above, it will be clearly impossible for this procedure to succeed where the applicant fails to establish the issues identified in the *Telcar* case as was demonstrated in *Impact International v Nigerian Consulate, Buea*.⁵³ The applicant commenced a simplified procedure matter by motion *ex-parte* for the payment of the CFA equivalent of 54.757 US dollars against the defendant in the high court Buea. The amount was allegedly the outstanding debt due from a contract to build a retention wall for the defendant.

On being served with the injunction to pay order, the respondent through counsel filed its response to the claim showing clearly that the construction was not done according

⁵²(2010) 1 CCLR 36.

⁵³ HCF/0021/SP/06/07.

to the terms of the contract. After a conciliation procedure which involved visiting the locus to ascertain the parties claims, the High Court Buea dismissed the respondent's claim on grounds that the debt was not due and owing in terms of the relevant provision of the Uniform Acts but contingent on the acceptable execution of the contract.

There is an alternative contention that the simplified recovery procedure is commenced by a simple application in the form of a letter addressed to the president of the court. HB Mbuton⁵⁴ justifies this position on the basis that in the absence of an official translation of OHADA laws into English, the views of French jurist and practitioners that the "requête" as used by the OHADA law is the procedure to be followed. He argues that "practitioners and jurists of the civil law culture which is the root of the uniform Act insist that the requête referred to in article 3 of the Act remains unquestionably the form and mode of commencement of the proceedings towards securing an injunction de payer' no more, no less."

Following from the above reasoning, Mbuton⁵⁵ concludes that: "while the users of the Uniform Act await the settlement of the differences through translation and interpretation from the original language of the Act into the English language, the safe course is to avoid distortive interpretation or proximate translation and rely on the notion as provided by the original language of the text."

According to Mbuton, "such a reliance should inform the choice of the mode and commencement". Based on this, He concludes that "it follows therefore that a simple application, provided it bears all the requisite elements of the debts as per the Act" is the appropriate mode of commencing such proceedings.

⁵⁴ H B Mbuton "Modes of commencement of proceedings and drawing of court processes under the OHADA Uniform Act on simplified recoveries" EU Training Workshop (2011).

⁵⁵ Ibid.

This view which is largely academic is with respect unsustainable and should be discountenanced. To accept it in the absence of a CCJA decision over-ruling the solid decision in the Telcar case would amount to creating the dangerous precedent that a court of appeal judgment can be made meaningless by a mere expression of an academic opinion in a seminar. Admittedly, this francophone preference is part of a concerted politically driven scheme to completely obliterate the English heritage of practice in Anglophone Cameroon yet it must be discountenanced. The commencement of proceedings by a simple letter may in fact be simple and straightforward yet it nevertheless remains unacceptable because of its potential to render lawyers in the Anglophone region irrelevant in future since it will make it easy for non-lawyers to attempt to dabble into this aspect of legal practice.

Action to Recover Property

Where someone's property or object is in the possession of another, the owner of the said property can approach the court by this innovative procedure for the return or delivery of the said property. For this procedure to be successful, the following must be met:

- 1) The object must be identifiable, tangible and movable.
- 2) The applicant must consider that he is owed an obligation to return the property.

Procedure

The procedures for both types of orders are similar. The first step is for the creditor or the person whose property is collected to file an application before the court having jurisdiction over the matter. The competent court is the court of the place of residence or domicile of the debtor or the court designated by the parties. The application must contain the exact identification of the parties the amount or properly claimed broken into components under pains of inadmissibility

as was stated clearly in the Telcar's case. The application is made ex parte. Once the court upon a thorough appraisal of the fact finds that the conditions are met by the creditor, the court shall proceed to make an order against the debtor either to pay in the form of liquidated sums of money or to return the property in the case of chattels or property.

The court it must be stressed does not have a so call inherent juris- diction to make orders that are contrary to the express provisions of the OHADA Acts. It was thus held in SIC CACAOS v Soppo Soppo Jean⁵⁶ that the order of the trial high court that the respondent prepares and serve an opposition after the prescribed five days' time period for doing so had lapsed was wrongly given. Noting that there is no inherent jurisdiction to side step the strict provisions of the OHADA procedure, the court of appeal Buea reversed the decision.

In all cases, the creditor shall have three clear months from the date of pronouncement of the order to serve same on the debtor. Upon notification of the injunction to pay order on the debtor, he shall have 15 days within which to file an opposition to the order, if any. Where he does not file any opposition within the prescribed period, the creditor shall seize the court by simple application for the final order or an order absolute.

Where the debtor files an opposition within the stipulated 15 days the matter will be pursuant to Article 25 of the OHADA law listed for conciliation. Conciliation takes the form of an ordinary trial in chambers in the sense that exhibits are tendered, declarations are made by the parties, and judgment thereafter given. Such judgments are subject to appeal in accordance with the rules of the national laws of the respective member states which in our case refers to Cameroonian laws.

⁵⁶Supra.

The final order in the case of an order to pay a liquidated sum of money must contain an indication that in addition to the amount owed, the debtor must pay interest and costs (the interest must be calculated according to the current bank rate). Where it is an order to deliver an object, the ruling should contain specific orders that the property or object in possession must be delivered or transported to a designated place of delivery at the expense of the debtor. Certainly, the aim of the Uniform Acts is to make both proceedings as expeditious as possible yet the practice on ground has shown that the Acts appear to have slowed the speed of getting enforceable decisions in cases where they apply.

Procedure for actions involving ships

Although actions involving ships are dealt with in the ordinary manner with regards to commencements, these cases have certain peculiarities in the context of Cameroon requiring special attention from a procedural point of view. Firstly, unlike in Nigeria where cases touching on vessels are regarded as admiralty matters falling within the exclusive jurisdiction of the federal high court, the same is not true in Cameroon. Clearly, a magistrate court may exercise jurisdiction over vessels under section 15(1)(b) and 15(2) of the Law on Judicial Organization 2006.

Section 15(1) (b) of the 2006 Law gives the magistrate court jurisdiction to hear matters where the amount of damages does not exceed ten million francs without any exceptions. A plain interpretation of this provision will surely allow actions involving ships to be done in the magistrate court where the amount is within the ten million francs range. The latter provision gives the magistrate court competence to rule on both *ex parte* motions and motion on notice without excluding those touching on ships. There will be no reason to suggest otherwise particularly as both the magistrate and high courts are courts of first instance.

Another important procedural feature with regards to matters dealing with ships is the fact that Order 22 rule 1 of Cap 211 which gives the high court competence to order the arrest of a vessel which is not enjoying immunity and is about to leave the jurisdiction at the instance of an applicant appears no longer to represent the law in the country. Article 114-121 of the Code Commuataire de la Marine Marchande which now governs maritime activities within the CEMAC zone has changed this province of the law in this domain significantly.

This code which is an international treaty ratified by Cameroon does by section 45 of the Constitution 1996 take precedence over local laws like the provision of Order 22 in an event of conflict. Art 119 of the code has made the arrest of a vessel a lot more difficult than the rules of court provides. Under it, the applicant who desires to arrest a vessel must get the endorsement of the mari-martial the chief maritime official in the port where the ship is berthed before an arrest may be made. This is unlike under Order 22 rule 1 which demands only the filing of a motion supported by an affidavit of facts.

In *Comatrans S.A v Corlett Actividades Maritimas Lda & MV Nadine Corlett*⁵⁷ Forbang J of the Buea High Court declined to make an outright order for the arrest of the 2nd defendant vessel berthed at Tiko until the motion for the arrest of the vessel was endorsed by the relevant maritime official. An arrest of a vessel in disregard of this requirement is clearly unlawful and would be set aside by the court of appeal with substantial cost against the party who caused the vessel's arrest. The judge however held that in the circumstances of this case where the 1st & 2nd defendants were agreed that they had received the hire fee for the vessel from the plaintiff, it will be inequitable to allow the ship to leave the port before the determination of the claim whether the vessel has discharged its obligation under the charter- party.

⁵⁷ Suit No HCF/166/05-06/2M/06 Unreported.

Based on the above reasoning, Forbang J held that:

“In order to water down the harsh economic effect that the arrest of a ship may cause to the ship owner the modern and common practice has been for the courts to order security from the ship owner in lieu of arrest as a just equitable and valuable measure. Such guarantee is usually in the form of a written undertaking or a bank guarantee.”

Preferring this modern approach, the High Court Buea ordered the defendants to deposit in the registry of the court the sum of Fifty Million francs cash or by certified check of a bank operating in Cameroon failure which the 2nd defendant should not leave the port.

It is worth noting that a vessel is a legitimate and proper defendant in certain admiralty matters in the Anglophone courts in the same way as ships are parties in England. In the *Comatrans S.A* case⁵⁸ the 2nd defendant a vessel was made a party in the suit. The suit was for breach of contract of hire of the ship by the first defendant who was attempting to sail the ship away from Tiko where the contract was to be performed. The defendant counsel's objection that the ship ought not to have been a party was disregarded as misconceived.

⁵⁸ The author was counsel for the plaintiff in this case.

Parties

It is not open to any doubt that all actions in court must be brought by parties who are competent to do so. This inflexible rule of practice invariably extends to the defence as the defendant must also be competent. Whether the party is competent or not is a matter of substantive law and the peculiar facts of each case. The facts are to be decided exclusively on the basis of the names appearing on the pleadings on the principle that parties are bound by their pleadings.

Specifically, a party's capacity is determined by the peculiar circumstances of each case. Natural persons must be majors to be competent parties in suits in Cameroon and this is fixed at 18 years of age. However since by section 86 of the labour code a 14 years old person can be employed as a worker, it follows naturally that such a 14 year old worker is a competent plaintiff in a labour action. For corporate personalities, their juristic personality is determined in accordance with the OHADA Uniform Act relating to Commercial Companies and Economic Interest Groups. It is only when a corporate entity is registered under the above Act or was prior to it registered under the relevant legal regime on either side of the Mungo that it can acquire the status to sue and be sued.

The OHADA system has created juristic personalities including the Société en Nom Collectif (partnership), the Société en Commandité Simple (Ltd partnership) SARL (private Ltd company) the SA (public ltd company). The OHADA system also has unregistered companies which nevertheless have the competence to sue. These include Société en Participation (joint venture), the Société de Fait (De-facto

partnership) and the Groupement D'Intérêt Economique or GIE (Economic Interest Group).

The importance of the competence of the parties in an action was beautifully stated by BB Bawak JCA as he then was in Mary Ngum S. Tabe Tabe corporate personality of common law and under the OHADA Uniform Act to commercial companies and Economic Interest Groups. A comparative study *Annales de la Faculté des Sciences Juridique et Politiques*. ((2008) Vol 12 p.3) v Asiyem Christopher⁵⁹. Here, B B Bawak sitting at the Bamenda Court of Appeal noted rather graphically that:

“A plaintiff to an action must be competent to institute such an action and if his competency is challenged, then the onus lies on him. Competency to institute an action is a vital factor in denying the competency of the action itself. It is also essential that persons who are to be made parties to an action are legal persons”

Based on the above foundational adjectival principle, the court of appeal dismissed the respondent's suit because having failed to provide evidence of the obtention of letters of administration, the respondents lacked the competence to either institute or defend the proceedings touching and concerning the estate of the deceased. The connection of the issue of the competence of a party to that of the validity of the suit and the jurisdiction of the court was further affirmed in this decision when it held that “for the above reasons, the entire proceedings are in law null and void and of no effect.”

It is worth mentioning that this position has its foundation in the celebrated dictum by Lord Denning in *U. A. C v MACFOY*⁶⁰ that:

⁵⁹ (2001) 2 CCLR 173

⁶⁰ *Supra*

“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding, which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

It is on the principle in the decision in *Amodu Rufai S and Others v Chief Imam Mamadu Ligali and Others*⁶¹ that a mere collection of persons who have not been conferred with any of the above status cannot sue or be sued in court. Equally obvious is the fact that the party has to sue or be sued in its registered name in terms of the decision in *NNSC v Santans*⁶². While it is correct that a party might sue one or two of members of a partnership where the partnership was registered prior to the coming to effect of the OHADA laws, a suit in the name of one or two partners of a partnership registered under the OHADA system is clearly incompetent and would be dismissed.

Objections With Regards To Party

A party may raise a preliminary objection as to the competence of a party for any of the reasons already averted to in the preceding discussion. However, unlike objections with regards to jurisdiction, an objection on the competence of a party has to be raised timeously. Although Aguda⁶³ has observed that the principles for the constitution of a party cannot be waived, it seems obvious that a party in the con- text

⁶¹ *Supra*.

⁶² (1988) 2 NWLR

⁶³ Aguda *op cit* at 32.

of Cameroon may not be at liberty to challenge the capacity of the other party anytime at his pleasure.

This Cameroonian perspective on this issue was dealt with in *Limbe Area Farmers Cooperative Ltd v Plantecam Medicam*⁶⁴. In this case, the respondent/cross appellant had submitted on appeal that since there was no evidence that the appellant was registered as a cooperative as prescribed by section 83(3) of Law No 92/006 of 14/6/92, the action by the appellant ought to have been regarded as unmaintainable in the trial high court in Buea. Continuing further with this trend of reasoning, the respondent argued that the appellant lacked the locus stand to sue.

Dismissing this submission as misconceived, A. K. Nana JCA of the Buea Court of Appeal stated the position of the law in this area rather thus:

“We agree with counsel....that the issue of capacity raised at this stage is belated and is tantamount to trial by ambush. The rules of the high court require that such an issue should have been raised in the statement of defence pleaded by the respondent/cross appellants in the court below”

The court of appeal quite correctly felt that to take the issue at that point was improper and unjust for depriving “the appellant/cross respondent the opportunity to prove the contrary if they had any defence to it”.

With particular reference to the defence, it must be observed that it was held by the same South West Court of Appeal in *Telcar Cocoa Ltd v Agwu Joseph Kalu*⁶⁵ that a party like the defendant/appellant cannot turn around and challenge the parties she brought to court. This decision is to be

⁶⁴ (2001) 2 CCLR 117.

⁶⁵ (2010) IICLR 21.

applauded as salutary because it would clearly have been perverse for the appellant who had filed the action with the said parties to turn summersault and challenge the competence of the appellant whom they had themselves constituted and brought to court as defendant⁶⁶. Besides, the decision was also sound on the specific procedural issue that a principal who is known can be sued on the legal principle that “when the principal is known and disclosed the agent incurs no liability”.

A preliminary objection on grounds of the competence of a party must be dealt with carefully since it is different from an objection that a necessary party has not been joined in the action. The latter is more or less idle. This is so as it was categorically stated by the Nigerian Supreme Court in *Sapo & Anor v Sunmonu*⁶⁷ that it is “settled that no cause or matter shall be defeated by the misjoinder or non-joinder of parties”. It was in the same decision held that the court is as a rule bound in every cause or matter to deal with the matter in controversy “so far as regards the rights and interests of the parties actually before it.”

Following from the above, it is clearly the right of a plaintiff to choose the person or persons he desires to sue. Ordinarily, quite apart from the decision in *Sapo’s* case, this rule is subject only to the logical fact that where no case is established against a defendant as chosen by the plaintiff, the case invariably has to be dismissed. In spite of this, it may be noted that bringing an improperly constituted defendant to court is a risky venture even if the matter is not struck out on a preliminary objection. This is so as it will be impossible to execute a judgment on a defendant who is a juristic personality different from the one who is the judgment debtor as specifically identified in the pleadings and decision.

⁶⁶ Note should be taken where the party brought to court is not a juristic person known to law, the decision will be clearly unenforceable.

⁶⁷ (2010) Vol 189 LRCN.

Inter-pleader Proceedings

Inter-pleader proceedings are designed to take care of situations in which or where somebody in possession of money or other property in which he had no other personal interest but which is the subject matter of competing claims by other persons. A good example may be presented by the case of a landlord who dies leaving behind his house and other properties and who is survived by his wife and brother. In the event of any competing claims between the wife and brother, the tenant in his house who is not disputing that he has to pay the rents or who has no interest whatsoever over the deceased said property may seize the court by way of interpleader action for the court to interplead between these two competing claims.

Another situation where the interpleader action may be adopted is where during execution of a judgment a bailiff seizes goods to satisfy a judgment where the goods are being claimed by one or more persons other than the judgment debtor. In both situations, the court as noted by S. Sime⁶⁸ and under Order 47 of Cap 211 has powers to order any person to be added as a defendant either in addition or substitution to the person making the application for interpleader. The author also noted that the court may also summarily determine the question in issue as it deems just in the circumstances including an order directing that the issues be tried between the contending claimants.

Suit in a Representative Action

There are certain civil actions where many persons may have the same interest in the cause of action involved both as plaintiffs and as defendants. Order 4 rule 3 of Cap 211 contemplates this possibility. Under this provision, “where many persons than one have the same interest in one suit, one

⁶⁸ Sime op cit at 180.

or more of such persons may with the approval of the court be authorized by the other persons interested to sue or defend in such suit”. The rule permits these representatives to sue or defend for the benefit of all the parties interested in the suit.

The circumstances where this will happen would vary from case to case. It may in the main involve a class of persons - community, village etc. In these situations, Order 4 rule 3 permits one of such persons to with leave of the court sue or be sued on behalf of the rest. Unlike in interpleader proceedings, the party in a representative action is acting for himself as an interested party in the action as well as for those he is representing. The purpose of this provision is to enable actions to be prosecuted together and expeditiously.

The People of Finge (Represented by Nchi Eric Lobtif Sub chief of Finge Bambui) v The People of Bambui (Represented by Angafor Momo Oh 111 Fon of Bambui)⁶⁹ interprets and illustrates the way this rule operates in practice. This action started as a land dispute involving the peoples of these communities in the High court of Bamenda who had over time been involved in violent conflicts over the land in question. On appeal counsel for the appellant argued that the respondent’s action at the trial court was incompetent and should be declared a nullity because the leave granted to sue in a representative capacity was given on the basis of a motion *ex parte* which was filed after the suit had been commenced.

The court while acknowledging that “from the authorities referred to, it is clear that the proper procedure to sue in a representative capacity is for leave to be sought before the action is filed”, categorically accepted that “if the suit is filed without leave the plaintiff representing the other persons can file a motion *ex parte* or a motion on notice before hearing” to regularize the situation by getting the required leave. The latter procedure of proceeding by a motion of notice is prescribed

⁶⁹ (2001) 1 CCLR 117.

according to F J Wacka JCA only when the defendants have been served. Dealing with the procedure adopted by the appellant of challenging the plaintiff's capacity on appeal, the court stated that:

“Be that as it may, the appellant had the opportunity of challenging the respondent authority to bring the action at the trial but they did not. Nwadialo says at page 90 top paragraphs that the defendant has to raise the question by way of preliminary objection on a motion and not by way of a defence. This the appellant did not do. They cannot now raise the issue on appeal”

It only needs to be added here that the challenge could as well be by way of a preliminary objection.

For a suit to be brought under this provision in a representative capacity, the following conditions must be satisfied:

a) Those represented must have the same interest or grievances with the person representing them.

b) The relief sort must in its nature be beneficial to all those being represented.

c) The parties in a representative action must give express permission or authority to those who are to represent them as was held in *Nwakhoba V Dumez Nigerian Ltd Ajaokuta*⁷⁰.

Where parties in a representative action alleged that they represent a group, any member of the said group can raise an objection against the party purporting to be their representative. In such a case, the representing party has a right to say he doesn't want to be represented by the said party. The title of a party or parties suing in representative action must be clear enough to show the capacity in which he is suing E.g.

⁷⁰ (2003) FWLR Pt 179 at Pg.1188

Mola Ojong Fiango (suing for and on behalf of the Fiango's family).

It is from the broad principle expressed in *The People of Finge (Represented by Nchi Eric Lobtif Sub chief of Finge Bambui) v The People of Bambui (Represented by Angafor Momo Oh 111 Fon of Bambui)*⁷¹ obvious that the failure to bring an action in a representative capacity cannot be the basis of dismissing an action. This principle was vividly captured by the Nigerian Supreme Court in *Vulcan Gases Ltd v G.I.V*⁷² where it was stated that if the authorization is not obtained to sue in a representative capacity until judgment in the matter, the action will be deemed to have been instituted and tried in a personal capacity. The courts are bound to decide actions for the parties as constituted in the suit before them.

Locus Standi

Although some may argue that locus standi ought traditionally to be considered as an administrative law concept, it does nevertheless present significant civil procedure features both in the Anglophones courts of records in Cameroon as indeed in Nigeria and elsewhere. It is for this reason apt to briefly deal with the notion from a procedural dimension here. Locus standi raises obvious procedural considerations because of the further reason that it by definition relates to the central question of parties.

The term locus standi was defined as relating to a party's legal capacity to institute proceedings in a law court in the celebrated decision of the Nigerian Supreme Court in *Adesanya v President of the Re- public of Nigeria*.⁷³ Clearly, to have locus a party must either have a special legal right or "sufficient or special interest in the performance of the duty

⁷¹ (2001) 1 CCLR 117.

⁷² (2001) 5 S C pt 1 12.

⁷³ (1981) 5 S C 2.

sought to be enforced.”⁷⁴ It is for this reason absolutely necessary to deal with the issue of local standi at the earliest stages of the suit ideally before the defendant files a statement of defence in the action.

The issue of locus is in fact a threshold one. It was thus in the case of Chief David Ikome Moline & others v Chief Simon Lyonga Musenja & others⁷⁵ held by Fonkwe JCA as he then was in the Court of Appeal Buea that the court could even suo moto meticulously examine the record of proceedings and evidence to determine if the plaintiff has the locus standi or standing to have initiated the suit. This decision of the court puts the centrality of standing in all civil actions in courts in a rather typical Cameroonian context. The courts according to this view should not limit itself but meticulously examine “the record of proceedings and the evidence adduced” on the principle that “an elementary principle of procedure that only persons having an interest to protect may bring action in court.

Based on this principle, Fonkwe JCA articulated the Cameroonian approach to locus standi by reference to the French saying “pas d’intérêt pas d’ action’...” Following the above illuminating articulation which comprehensively captures the position in Cameroon, the court of appeal held that the interest of the plaintiff was title over unregistered land and allowed the appeal. By so holding, the court of appeal took the view that the lower court ought to have dismissed the action of the plaintiff since it raised an issue falling outside the jurisdiction of the court.

⁷⁴ P Aderemi Modern Digest of Case Law Spectrum Books Ltd Ibadan (2000): 112.

⁷⁵ (2000) 1 CCLR 1.

Intervener Proceedings

Where a plaintiff or defendant who has vested interest in a cause of action is not listed as a party in the said action, he or she may by way of intervener proceedings file an application before the competent court to be joined as plaintiff or defendant. A non-party in an action may in the alternative be brought into the proceedings as a third party by one of the existing party in the suit as constituted usually the defendant. The option adopted depends entirely on the judgment of counsel based on the peculiar facts in controversy.

Third Party Proceedings

It may in certain cases become necessary to bring in parties as defendant/s who were not originally parties in the action as conceived by the plaintiff. The third party proceeding is a proceeding whereby the defendant in a claim seeks to bring in another defendant as a third party in the action brought against him/her. The rationale behind this practice is based on the idea that the party sued reasonably believes that the defendant sought to be brought in as a third party should share the liability.

The third party proceedings may be predicated on a wide variety of circumstances which may not be comprehensively dealt with here. Regardless of the basis, the essence of this proceeding is that although the defendant could have had an independent claim against the third party, it is for the purpose of convenience better for such a claim to be resolved together.

An ideal example where such procedure may be used is in insurance claims like in *Mbuta Abeya W v Kontchu Ernest*⁷⁶81

& Anor⁷⁷82 where SOCAR was joined in an insurance claim against the defendant. This procedure prevents the multiplicity suits.

In *Ruth Eyong & others v SCDP & Anor*^{81a} the second defendant filed third party notice bringing in the 2nd third party in the action. This procedure was regarded as appropriate by Temple Cole J of the high court Kumba for the reason that the 2nd third party was the independent contractor who was managing the petrol station where the plaintiff bought kerosene that exploded and burnt her. The rationale for bringing the 1st and 2nd third parties was to ensure that they assume their vicarious liability to indemnify the plaintiff for injuries caused to her by the explosion of the kerosene which the first defendant sold.

Joinder of Parties

Order 4 Rule 2 of Cap 211 liberally permits multiple parties to commence actions as plaintiffs subject to the fact that they have a common interest in the cause of action. The crucial feature here is whether or not the parties have a genuinely common interest. Once this exists, there are a plethora of authorities showing that the parties can bring actions as joint plaintiffs.

Where the parties have a genuinely common interest, it will be possible for them to sue as joint plaintiffs or for one of them to bring an action in a representative capacity for all of the others. It will be clearly impossible for persons to sue as joint plaintiffs or bring a representative action only because they have a common defendant or the offending actions are similar where they do not share a common interest. The

⁷⁶ Suit No CASWP/46/2004.

^{81a} (2000) 1 CCLR 21.

⁷⁷ (2000) 1 CCLR 21.

Nigerian Court of Appeal thus held in *Honkong v Ajibawo*⁷⁸ that the plaintiff case against the defendant's company must be dismissed because each one of the plaintiffs had a separate cause of action distinct from the others. Although all the plaintiffs were members of an extended family who were complaining that waste from the defendant's industrial plant had polluted their farms and a nearby river destroying their livelihoods, the court held that each plaintiff had a separate cause of action because they own their farms separately and the damage done was distinct and particular to each farm.

The decision was based on the old rule derived from the decision in *Amachree & Others v Newington*⁷⁹ which is the locus classicus on this point. On the plaintiff's single claim for money as damages for wrongful arrest and detention, it was in the *Newington's* case held that each of the plaintiffs had a separate cause of action on the basis of the extent of the damage/injury suffered. The court rightly held that the fact that the defendant arrested and detained them on separate occasions made it impossible for the plaintiffs to bring a joint claim. It is worth emphasizing that Aguda⁸⁰ had while reviewing this case stated that "the position would have been different had the alleged assault and false imprisonment took place on the same occasion"

The rules are silent on whether or not many parties may be joined as defendants in an action by single or joint plaintiffs. In dealing with this issue, it is important to stress that the approach taken by Aguda⁸¹ must be appreciated in context. The reliance by Aguda on the rules of courts of the Western and Lagos States of Nigeria to conclude that defendants can be

⁷⁸ (2010) All FWLR 997.

⁷⁹ See Court of Appeal in *Ecobank S A v Nelson Fomenky & Anor* Suit No. CAWP/31/2007

⁸⁰ Aguda opcit at 33.

⁸¹ Ibid.

jointly sued in such situations are irrelevant to Cameroon because these rules have no application here.

However, it is obvious that many parties may be joined as defendants in the regions under reference where the conditions exist. This conclusion is the result of the practice and customs of the courts in Cameroon spanning from the colonial times to date. This practice has crystallized into a standard rule of practice too notorious to be challenged. In *Becky Rebecca Oweh v Ambrose Pius Fonka & Anor*⁸² the appellant successfully sued the first and second defendants in the High Court, Buea. Although this issue was not expressly canvassed, Njie JCA proceeded with the matter since both defendants were sued in an originating summons to determine questions over land in which the plaintiff was challenging a mortgage. Once the interests are genuinely similar as was the situation in the present case, several parties may be joined as defendants.

It is in fact usually standard practice to join the driver in an insurance claim where the issue is that the driver of an insured vehicle was negligent. In *Jacob Kay v Brasseries & 2 others*⁸³, the plaintiff joined both the driver and the insurance company for his claim for compensation in respect of the hitting and destruction of his car in Kumba by a Brasseries truck insured by the insurance company. Such joinder is highly desirable because it allows the judgment creditor the latitude to enforce the judgment against any of them.

However, a circumspect counsel acting for a plaintiff should in spite of what has just been said consider some important factors before bringing parties as joint plaintiffs. These include the weakness of a particular plaintiff's case which may be exploited by the defence to their advantage, the impecuniosity of a particular plaintiff which may become a burden to the other plaintiff in event of a joint decision against

⁸² Suit No CASWP/61/2006

⁸³ HCK/21/2010.

them. It is to be noted that the practice of the courts particularly when based on the rules of court have established certain practices which cannot be casually disregarded or ignored because of arguments based on some indirect implication of legislation local or foreign.

*Ecobank S.A v Nelson Fomenky & Anor*⁸⁴ is a case in point where the Court of Appeal categorically rejected the view that Section 170 of the Uniform Act on Simplified Recovery Procedure for the recovery of Debt and Measure of Execution has supplanted and replaced the Supreme Court Civil Procedure Rules. It had been contended by the appellant that the OHADA laws are the relevant legislation regulating the rules for the determination of the proper venue to commence an action in contracts noting that since the 2nd respondent was not doing business in Fako, the Buea High Court was wrong under Section 170 to have assumed jurisdiction in the action.

After castigating this contention, Mbah Acha JCA held that the issue of the proper venue to commence an action in the common law courts is a function of the pleadings in the statement of claim and the Rules of Court CAP 211 particularly under Order 7 Rule 4 thereof. The learned Justice of the court of Appeal put the issue rather clearly thus:

“Counsel for the appellant referred this court to Section 170 of the Uniform Actwe have examined that section of the cited law. In fact the whole chapter i.e. chapter 111 of this act deals with protest against forceful executionThe substantive suit before the Fako High Court is for breach of contract, negligence and deceit. As far as general contract law is concerned, the SCCPR CAP 211 still apply in the common law courts of Cameroon”

⁸⁴ Suit No. CASWP/31/2007

The judge very appropriately went ahead to note the relevant rule as Order 7 rule 4 which allows in cases of contract two possible venues. These venues the learned Justice held are the one that the contract ought to have been performed in or the judicial division in which the defendant resides. Based on this, the court of Appeal held that Justice Forbang of the Buea High Court was correct to assume jurisdiction since although Ecobank did not have a presence in Buea, the contract was to be performed in Fako Division. This decision is sound and unchallengeable for the further reason that the first defendant (Amity Bank) was doing business in Limbe which is clearly within the territorial jurisdiction of the court.

It may sometimes become absolutely necessary to determine when a matter was commenced in court as the entire validity of the proceedings including whether the action should be dismissed on a preliminary point or not will turn on this point. In *Emyombo A George v Commanauté Croissance Mutuelle (m,2) & Bank Phyluske*⁸⁵ the court of Appeal, Buea resolved this issue rather categorically. In a controversy centering essentially on whether a petition for solicitors fees were filed on 6/7/2007, 9/7/2007 or 6/8/2007 the court held thus:

“Now after a close understanding of the case from the trial court, I find no room for doubt or equivocation or argument on the certainty of the date when the respondent filed their petition in suit No. the date is certain and crystal. It is the date when the respondent paid the fees in the registry of the trial court and that is

While appearance is for the party named in the suit, it is a general principle of practice that any person not named in the process may intervene and seek leave to appear in the suit. In

⁸⁵ CASWP/05M/2008.

probate actions, anyone interested in the estate may file an affidavit disclosing his interest to appear in the action. It was in *Richard Enonchong & Anor V Enonchong & others*⁸⁶ held that the applicants, a customary law's wife and son of the deceased could intervene and appear as parties in the action in the high court although they were not named in the original application. The original application was brought by the original applicant to reconstitute a marriage between the applicant and the deceased without making the deceased customary wife and children parties.

Finally on this point, it must be noted that appearance is by simply physically coming to court except for part 8 alternative proceedings and probate actions. For part 8 alternative procedure claims the defendant has 14 days to file an acknowledgment of service which must be accompanied by an affidavit of the evidence that the defence is based under rule 8.3(1) of the English CPR. In probate actions the respondent is required to complete the questionnaire which accompanies the petition and file same in the registry.

Appearance

It is in the nature of litigation for the parties both plaintiff/defendant, petitioner/respondent and applicant/respondent to attend court to establish their claim or defence as the case may be. This is the minimum civilized expectation in all proceedings with the exception of ex-parte applications. Having a case heard and determined behind the back of the adverse party would in principle violate the preambular provisions of the Constitution 1996.

Much of what Aguda says on appearance does not apply to the Anglophone courts because they are based on the old rules applicable in Lagos state which do not have similar provisions in Cap 211. However, by Order 15 Rule 1 of Cap 211 it is clear that parties involved in every cause or matter pending before the courts are required to appear in court in person.

The side notes of rule 1 indicate that the court may permit parties to appear by proxy. On sufficient reasons shown, the court could on an application which could be done ex-parte allow anybody appointed by the plaintiff/defendant to appear on behalf of the absent party. The representative could be any master, servant, clerk or member of the family of such plaintiff or defendant. The application must be supported with affidavit evidence showing that the proxy has the express authority of the plaintiff or defendant sought to be represented. Although ideally such authority can be best evidenced by a written authorization annexed as an exhibit in the affidavit, averment in the affidavit categorically indicating that the authority has been given should be sufficient to cause the court to exercise the discretion permitting a proxy to appear for an adverse party.

The rule requiring the party to appear in court must be appreciated in context. It applies only in cases where the plaintiff or defendant is not represented by counsel. Order 15 rule 1 of Cap 211 limits the appearance in person in court only to the plaintiff or defendant who may not be represented by a solicitor. This rule must be given its plain grammatical meaning such that once counsel appears in court for a party there should be no further need to insist on the appearance of the party.

Based on rule 1, it is clearly wrong for a court to award cost in a civil suit in which counsel represents an absent party for the nonappearance of the party. Such cost would rightly be set aside as an injudicious exercise of discretion on appeal since a party's appearance is not absolutely necessary in civil actions. This situation is however distinguishable from the absence of a party who though represented by counsel is a witness expected to testify in the action. In such a case (including the case where witnesses fail to appear to testify) an award of cost will be appropriate. The cost in this latter situation is to compensate the victim party for the time wasted.

In all cases where a proxy appears for a party, it is certain from Order 15 Rule 3 that the proxy steps into the shoes of the absent party for some purposes only. Rule 3 specifically recognizes that there are some acts that the proxy cannot legally do for the absent original party.

Default of Appearance

An unrepresented party who has been served with court process must appear in court to do the case. Where such a defendant fails to appear, the plaintiff or (applicant /petitioner as the case may be) is at liberty to seek leave of court to state his/her case in default of appearance. Such leave is ideally applied for by motion on notice in courts of records like the High Court and Court of Appeal. It was on the basis of this procedural principle that Nana JCA held in *Blassius Njanjo v*

Manondo Alice Ekema Wilson⁸⁷ that the plaintiff/respondent was right in stating his case with leave of the court against the defendant/appellant who had repeatedly failed to appear at the High Court to answer to the plaintiff's claim.

Respect for the rules of court requiring appearance and the filling of defences are matters to be taken by the parties in an action seriously.

Indeed, the entire judicial proceedings and search for justice depends on the absolute necessity of respecting the rules of court and not in their deliberate disobedience. In the Blassius Njanjo case, plaintiff respondent sued the defendant appellant for possession of rented land. The defendant/appellant who was served not only refused to appear in court but “threatened to beat the process servers if they should set feet again in his compound to serve him with any more summons” in the matter. The learned Chibili J heard and gave judgment to the plaintiff in default of the appearance of the defendant.

On the above facts, the appellant brought a motion on notice in the Fako High Court to set aside the decision of Justice Maureen Chibili. The appellant had contended that the judgment should be set aside because it was given behind his back. Although the applicant relied on the grounds for setting aside decisions canvassed by Obi Okoye Vol 1, Chibili J rightly dismissed the application.

On appeal, the court of appeal while acknowledging that ‘it is a cardinal principle of law that any judgment obtained against any party in his absence may on sufficient cause being shown, be set aside by the court.’, categorically held that this is one area where the court will exercise its discretionary power to dismiss the appeal against the decision of the trial court rejecting the motion to set aside. Nana JCA reading the lead decision of the court noted in particular as follows:

⁸⁷ Suit No CASWP/15/2008

“as to the principle on whether the respondent will be embarrassed or prejudiced upon an order of rehearing, we are of the opinion that the defendant appellant by his action delayed justice in this matter. Justice delayed is justice denied. Defendant/appellant had slept on any right of defence which he had.”

Nana JCA further deprecated the fact that the appellant “had been served personally with the hearing notices” including the ruling of the court ordering the respondent to state her case in default but the appellant choose to rather contemptuously threaten the process servers. The court of appeal in the circumstances rightly concluded that “filling an application to set aside only after the court judgment had been served on him was quite embarrassing to the plaintiff respondent who had been made to understand through the defendant/appellant conduct that he has no defence to make in the case.”

A circumspect reading of the Blassius case will show that it has significantly also established the principle that an order to rehear a case where judgment was given in default will not be granted where there has been an intervening third party interest in the subject matter of the decision. This point was pointedly made by Nana JCA who noted that:

“as earlier stated, the plaintiff/respondent believed after several weeks of notification of the judgment on the defendant /appellant that in his usual way of behaving he will not react to the judgment. She proceeded to sell the parcels of land and third party acquired rights as a result of the sale. An order for rehearing should have been prejudicial to these third parties as was decided in the case of *Idam Ugwo v Nwali Aba & others* (1961) All NLR 438”

The other issue that is closely connected to what has been said here is that associated with how to proceed when the defendant/s fails to appear. Should the plaintiff call evidence to establish the claim or simply move the court to give judgment in terms of the writ? This issue was raised in the Buea high court case of Uche Anyanwu v Elad Pascal and was quickly resolved on the basis of the rules of court. Blassius Njanjo v Manondo Alice Ekema Wilson⁸⁸ establishes the principle that evidence should be called as was also done in the Elad Pascal's case as well.

However, it may be permissible in certain cases for the plaintiff to simply ask for judgment in terms of the pleadings in default of appearance. Apart from cases of claims for liquidated demands where this could be done, it is clear from the case of Max Ntangsi v Caroline Ntangsi⁸⁹ that a petitioner in a matrimonial action may ask for judgment in terms of the petition where the respondent fails to appear. Even in cases such as this, Judges will normally adopt the prudent approach of requiring the petitioner to lead evidence to establish claims for property adjustment where the respondent fails to appear in a matrimonial cause. The wisdom of doing so is that evidence like deeds and land certificates may prove the contrary of the property claims being made against the absent party.

Absconding defendant

Closely connected to this issue is that associated with a defendant who not just fails to appear but is also planning to abscond from the jurisdiction of the court. It will appear from Order 19 rule 1 and 5 of Cap 211 that a high court could on the application of the plaintiff make either of two orders either at the institution of the suit or thereafter. The court could

⁸⁸ Suit No CASWP/15/2008

⁸⁹ HCF/032/MC/04-05.

order that security be taken for the appearance of the defendant to answer and satisfy any judgment that may be passed against him or an order committing the defendant into custody “in the event of the defendant neither furnishing security nor offering a sufficient deposit”.

Both orders may from the express provisions of rules 2 and 3 of Order 19 only be made when there is affidavit evidence showing that the defendant has disposed of his property or removed the property from the jurisdiction as a prelude to escaping from the jurisdiction of the court. The affidavit evidence must also establish that the defendant’s intention to escape is deliberate and clearly linked to the desire to render the anticipated judgment nugatory or impossible of enforcement.

It has to be stressed that both orders are problematic with the result that the court will be loath to grant them under the current pro human rights dispensation. Order 19 rules 1 and 5 which have colonial rings around them have certainly become obsolete having fallen behind the realities of today’s globalised world where physical distance has become increasingly insignificant. Besides, to make an order for security against a defendant or requiring him to make a deposit in the context of Cameroon where they are professional bailiffs involved in the enforcement of judgment as a professional business is plainly unnecessary. Making such an order is additionally unwise since it creates the impression that the judge had decided for the plaintiff even before hearing the case.

Rule 5 which allows the court to commit the so call absconding defendant into custody is manifestly objectionable for being unconstitutional. Cameroon has ratified the Covenant on Civil and Political Rights 1966 and its two optional protocols. This treaty (as well as the many other ones ratified by the country) by section 45 of the Constitution 2008 takes precedence over provisions like Order 19 rule 5 which is inconsistent with the treaty provision.

The rule that a defendant can be arrested and committed to prison to ensure that a yet to be delivered judgment would be paid is barbaric for violating the spirit in the provisions of Article 11 and 26 of the treaty⁹⁰ in addition to infringing the country's presumption of innocence for those standing charges of any allegation that might result in imprisonment. Article 11 prohibits the imprisonment of anyone only because he has been unable to fulfil a contractual debt.

Act 26 states that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law” amongst others. To put a defendant in prison to ensure that he may satisfy some future decision amounts to grotesque discrimination on the basis of his financial circumstances as well as a denial of the protection of the law. What if after being in prison the defendant wins the case for which he was detained to ensure that he pays the judgment debt?

Conditional appearance

The usual practice which has crystallized over time is for the defendant/respondent to simply appear in court without the need to file a memorandum of appearance. The only exceptions are in the alternative claim procedure and matrimonial matters. In the latter, the defence has under rule 8.3(1) of the English rules to file an acknowledgement of service within 14 days and in matrimonial causes the respondent has to file an answer to the petition. It is however permissible for the defendant to enter a conditional appearance to the originating process.

This procedure is distilled from the practice of the courts over a long time. Under this procedure, the defendant files a memorandum of appearance in which it is expressly stated that

⁹⁰ See also the preamble to the Constitution of Cameroon 2008 which also prohibits discrimination on the basis of the idiosyncratic grounds stated.

he/she is appearing under protest and reserves the right to object to any irregularity on the writ or the service thereof as the case may be. A conditional appearance may also be entered as a prelude to challenging the jurisdiction of the court.

Aguda⁹¹ has observed that the “effect of an unconditional appearance is a waiver of a precedent irregularity and the defendant will be taken as having submitted to the jurisdiction of the court”. The first part of this conclusion may be right. It was thus held in *Jozerson Industries Co v R Lauwers Import-Export*⁹² that a party who takes any steps after service of the writ on him/her cannot complain of any irregularity afterwards either in the course of trial or on appeal.

The second part of the conclusion is with respect not consistent with principles expounded by the courts in Cameroon on the point. It is certain from the decision of the court of appeal in *Société Nationale D’Electricité Du Cameroon (SONEL) v Vincent Veche* (Trading under the name and style of *Electro-mesches Enterprises*)⁹³ that the failure to raise an issue of jurisdiction whether in the memo of appearance or by way of a preliminary objection does not in itself make a court which would otherwise not have had the jurisdiction to hear and determine the case to do so. Parties seldom resort to the entering of conditional appearance since its value is limited to the fact that it enables the party challenge irregularities associated with an action. Such challenges hardly succeed because they are invariably seen by the courts as an attempt to rely on technicalities at the expense of the substantial justice of the case.

⁹¹ Aguda op cit 82.

⁹² (1998) All NLR 310.

⁹³ (2012) 1 CCLR PT 15 1.

Venue

The venue where an action is commenced is very important. Aguda⁹⁴ has for this reason rightly observed that “one of the first points the solicitor has to be clear about” before applying for a writ of summons “is the proper place for the institution of action”. Quite clearly, the issue of commencing in the proper venue is absolutely critical because a court is without jurisdiction to hear and determine an action that lies outside its territorial competence.

The venue of a suit in the context of the high courts in Anglophone Cameroon is determined by Order 7 Rules 1-6 of Cap 211. It is essential to observe that rules 1 to 3 of Order 7 clearly indicate where specific actions may be commenced. By rule 1 of Order 7, “all suits relating to land or mortgage or charge thereon, or any other interest therein, or for any injuries and all actions relating to personal property, detained or seized for any cause” shall be commenced and determined in the judicial division in which the land is situated.

Furthermore, actions for distress and seizure shall by this rule be instituted and heard where the distress occurred. This rule is a restatement of the common practice under the common law where in matters relating to immovable property the suits is the determining consideration with regards to where the action may be instituted. It must nevertheless be stressed that this rule must be interpreted in context in Cameroonian courts since regular courts do not have the competence to hear matters relating to title to lands which do not have land certificates. Baring the above context, it is obvious that all matters relating to trespass to land must under the above rule

⁹⁴ Aguda op cit at 60.

of necessity be instituted in the judicial division where the land is situated. Similarly, all actions connected to land such as those in nuisance shall be commenced and heard in the court where the land is located.

On the other hand, actions for recovery of penalties and forfeitures and also all actions against public officers must by rule 2 of Order 7 of Cap 211 be instituted and determined in the court of the judicial division where the cause of action arose. Since it is the cause of action rather than the parties or the subject of the suit that is the determining factor, it is vital for counsel to review the facts carefully before applying for the writ of summons. The case of *James A. Akum v Tchoussongou Augustine*⁹⁵ that was brought in the Bamenda High Court for the malicious destruction of property by the SDO of Mezam was considered by the court of Appeal Bamenda as properly instituted for amongst other reasons because the cause of action arose in the Mezam judicial division. The point has always to be made that the phrase “all actions against public officers” must be construed in context. This contextual appreciation is essential because the regular courts do not have the jurisdiction to determine disputes which are administrative in character as was affirmed in the *James A Akum* case as well.

By rule 3 of Order 7 which deals with specific performance and contracts, actions for the breach of contract “may be commenced and determined in the judicial division in which such contract ought to have been performed or in which the defendant resides.” The use of “may” in this rule in contrast to the word “shall” used in rules 2 and 3 is striking. The use of the word clearly means that the court have some discretion over this matter and could allow the institution of an action of this nature in a venue that will have under a strict construction of rule 3 been regarded as improper. Besides, it further means

⁹⁵ (2001) 1 CCLR 30.

that rule 3 permits a plaintiff wishing to institute an action for breach of contract or specific performance three separate venues to choose from.

These venues are the court where the defendant resides; the venue the defendant carries on business⁹⁶ as was indicated in the Eco Bank case and where the action arose. It needs to be stated that in cases of doubt it would be wise to institute the action in the judicial division where the defendant resides. This rule of thumb in this domain is supported by the provision in rule 4 of Order 7 which prescribes that “all other suits may be commenced and determined in the judicial division in which the defendant resides or carry on business”.

An important point to note here is the fact that the second sentence in rule 4 gives the plaintiff the liberty to commence the action in a judicial division of his convenience where there are multiple defendants residing in different judicial divisions. Yet, it is obvious in spite of the provision of rule 4 that this discretion is not absolute. The court may at the application of any party in the proceedings or suo moto make any order as the court deems fit and convenient for hearing the case. Such an order could for instance involve transferring the matter to another court in a judicial division that the judge considers most appropriate.

Although the court has the power to order as indicated above, the order/s should be just and appropriate. The court's order in this regard as with all judicial decisions must not be given without hearing all the parties involved. It has thus been held in *Ogundele v Agiri*⁹⁷ that a court cannot raise an issue of its own accord and resolve it without giving the parties the opportunities to address the issue. More importantly, the order must be judicious in the sense that it is based on a careful appreciation of the facts as they exist. The principles which

⁹⁶ See *George V Savannah Bank of Nigeria PLC* (2010), ALL FWLR

⁹⁷ (2010) ALL FWLR 1

governs the courts in situations like this is that the case is usually heard where it will be most convenient and less expensive to do so. Based on this principle, the courts would almost invariably hear such cases where the witnesses predominate.

It should however be pointed out that rule 3 of Order 7 does not give the plaintiff any discretion outside that expressly indicated in the rule itself. It would be erroneous for a plaintiff to claim that because the word “may” is used in rule 4 this means that the entire provision is discretionary. The Court of Appeal Buea had categorically held in *Société National D’Electricité Du Cameroon (SONEL) V Vincent Veche* (Trading under the name and style of Electro-mesches Enterprises) that the commencement of an action by the plaintiff in the High Court Buea was wrong. The court in so holding rejected the appellant /Respondent submission that it was entitled to do so under Order 7 Rule 3 of Cap 211 thus:

“The contract which the respondent claims were breached were entered into in Douala (*les loci contractus*) and were to be executed in Mamfe and Santa (*les loci celebrationis*) they had nothing to do with the Fako high court”

This decision is unassailable on the ground that there was only a single defendant in the suit.

Transfer of Suit to Different Judicial Divisions

Ordinarily, bringing an action in a wrong venue or judicial division, robs the court of the jurisdiction to entertain the matter. It was thus held in *Salihu v Ministry of Defence*⁹⁸ that issues of this nature must be dealt with first since a judgment or ruling delivered by a court without competence is a nullity

⁹⁸(2012) 1 CCLR PT 15 1.

irrespective of how well the proceedings were conducted by the judge. Order 7 Rule 5 of Cap 211 has prescribed that objections on jurisdiction on the grounds of venue be taken “at the time when he (the defendant) is expected to state his answer or to plead in such cases”.

Quite clearly, this means that such objections as *V. Ngassa J. held in Jesco M. Williams v the Fako and Expropriation Commission & Anor*⁹⁹ should be “raised in liminelitis or at the earliest possible opportunity so as not to constitute a disrupting ambush on the other side”. However, unlike with other cases relating to jurisdiction, the advice of *Ngassa J.* must be taken seriously for obvious reasons. Firstly, where the objection is not dealt with timeously it could be overtaken by other events which will make it impossible for it to be raised at any stage of the proceedings including on appeal.

By Rule 6 of Order 7, where the judge has ordered the suit to be transferred to another judicial division where the judge believes the action belongs, “such an order shall not be subject to appeal”. It is obvious therefore that when Rule 6 is read in conjunction with the first sentence in Order 7, the trial court has near absolute powers of transfer of a cause in circumstance where there are multiple defendants.

⁹⁹ (2010) All FWLR 63

Hearings

Hearing deals with the actual determination of the case in court covering from the taking of evidence to addresses. In such matters, the first important issue for consideration is that related to which of the parties is to commence the proceedings. Traditionally, the plaintiff is the party to begin his case by calling evidence. However, it is important to indicate that Order 42 rules 1 of Cap 211 is the provision which determines the party to commence in the unusual event of a dispute over this issue.

The rule makes the burden of starting the case a function of the nature of the material issues and or questions disclosed on the pleadings. Where from the pleadings and issues raised the burden is on a particular party, the party has the responsibility to start. This in principle means that where the burden is in fact legitimately on the defendant he should be the one to begin. The court does however also has the discretion to determine this issue and decide otherwise than what would have been the case.

A different and more satisfactory way of explaining this issue is by reference to the law of evidence. The rule of evidence is that he who asserts must prove. This means therefore that the party who asserts a thing must be the one to take the trouble to establish what he has claimed. In fact, section 136(1) of the Evidence Ordinance applicable in the regions under reference puts this issue beyond contention. It provides that “in civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side”. It is certain that barring any

presumption that may arise on the pleadings the party to start is the one who has asserted something upon which his claim stands or falls.

Although the books appear to suggest that counsel for the party commencing should begin with an opening statement summarizing their case, this seldom occurs in actual court room practice. This antiquated practice which is furthermore not demanded by any rule has been overtaken since the lawyer of the plaintiff or defendant commences his case by simply leading his witnesses as s\he deems appropriate. A decision of this nature is usually taken during the case management pre-trial conference in chambers. Though as has been indicated there is no hard and fast rule regulating this area, excellent practice demands that the plaintiff or defendant is taken first. Evidence is given in chief, cross examination is done and then the person calling the witness re-examines the witness if in the opinion of the court there are any doubts to be cleared.

The party who begins has to ensure that he establishes all the material elements that will make the suit successful. After doing so, order 42 rule 2 requires the party to inform the court that he/her has concluded his/her case. This is technically done by simply saying “that will be the case for the plaintiff or defendant as the case may be”.

The rule of fair hearing in the preamble of the Constitution of 1996 and Order 42 rule 5 of Cap 211 makes it mandatory for the other party usually the defendant to be called upon to state his own case. It will be a complete travesty of justice where the defendant is not called upon to do his case by leading evidence at the hearing. The defence if it chooses to call evidence follows the same trend as the plaintiff.

The case is that of the parties and not the judge. A decent judge must be fair and avoid interfering unduly with the proceedings. A judge does not have an unfettered discretion to call or recall a witness during the course of the proceedings in a civil trial. A judge who unnecessarily calls or recalls a witness

certainly risks opening himself up to charges of impartiality. Order 42 of Cap 211 does permit a judge to do so in the interest of justice only in cases where the facts to be introduced emerged subsequent to the filing of the suit. It was under a similar rule of court held in *Ogberejeko Ogbodu v Eriyota O & Anor*¹⁰⁰ that though the discretion of a judge to recall a witness is one which should be exercised with great care, it will be wrong to say that a judge does not have the discretion to recall a witness at any stage of the proceedings when the interest of justice demands it.

Although possible and available, the defence must be very circumspect in choosing the option of not calling evidence as the consequences could be very devastating in the long run. This option of resting the defence case on that of the plaintiff may be a smart and devastating strategy just as it could as well turn out to be an irredeemable catastrophe for the defence. *Barrister Boma Innocent (doing business under the name and style of Galaxy Snack Bar) v Cameroon Printing and Publishing Company Private Limited (CP & PC Ltd)* (represented by Tita Muta George¹⁰¹ illustrates this salient point interestingly.

The appellant who called no evidence at the trial submitted on a rent matter at the court of appeal that the defendant/appellant were tenants who paid rents etc. but the respondent retorted in their own arguments that the submission was untenable. The respondent contended further that since no such evidence was called at the trial court where the defendant had rested their case on that of the plaintiff, the argument was irrelevant. In dealing with this issue, AK Nana JCA after noting that “to begin with appellant rested his case on that of the plaintiffs/respondents” held rather sublimely that “where a defendant rests his case on the plaintiff’s he is in effect submitting that the plaintiff has failed to make a prima

¹⁰⁰ (1967) ALL N L R 183.

¹⁰¹ Suit No. CASWP/73/2007

facie case and electing, in consequence, not to call evidence in support of his own case”. The judge referred for this conclusion to the case of Hameed Toriola vs Ohishola Williams¹⁰².

The legal implication of this option the judge held “is that he is then bound by the evidence of the plaintiff as was stated by Fidelis Nwadialo on Civil Procedure in Nigeria at page 555 paragraph 30-28”. Based on this, the court did not hesitate in holding that:

“The appellant gave no evidence in the Court below. The appellants’ Counsel sought to give evidence in submitting that the appellant paid rents, did renovation in the premises, etc. This is a legal fallacy and amounted to nothing. The evidence of the plaintiffs/respondents was cogent and unchallenged. They gave evidence that the appellant was never their tenant and had not paid rents. Even if the Court were to hold that the appellant carried out some development on the premises, to be considered by the Court it must have been with the consent of the respondent in writing.”

After the conclusion of each party’s evidence, counsel then addresses the court. Where evidence has been taken and witnesses called, the defence begins the address although the court may at its discretion decide that the plaintiff begins. There is in fact no hard and fast rule over this issue. The real critical question here is that associated with whether counsel can insist to address as of right. It will be strange for a counsel who desires to address the court to be denied the right to do so by a judge.

¹⁰² (1982) 7 SC 27

Dealing with documentary evidence

Sometimes the fate of a suit (that is whether the action succeeds or fails) will critically hinge on documentary evidence. It is for this reason necessary to discuss the management of documentary evidence both in a substantive suit and during interlocutory applications. The first point to stress here is that a party must do well to plead any document he/she proposes to rely on in prove of the case the party has brought or to establish the defence sought to be relied on.

It is worth pointing out that Order 29 rule 5 gives the court the discretion to “order any party to the suit to make discovery upon oath of the documents, which are or has been in his possession or power, relating to any matter in question in the suit”. Discovery cannot however be made on a document which has not been pleaded or containing facts which has been admitted since in both examples no issue has been raised on the document. Evidence which goes to no issues should on the broad principle in *Sonel v Manfred M Noto*¹⁰³ be rejected by the court¹⁰⁴.

Notice to produce

Order 30 rule 8 of rules of court Cap 211 which as has been observed is specific to the high court's in the Anglophone regions gives the high court the discretion to order the production of any document in the keeping of another party to the suit at the trial of an action before it. This discretion can only be exercised in favour of a party where the party or his counsel has served the other party with a notice to produce. Such a notice may be served on the other party directly or through his solicitor at the earliest opportunity.

There appears to be some misunderstanding about the nature of this notice and its mode of service in Cameroon.

¹⁰³ (2000) 1 CCLR 13.

¹⁰⁴ See also *Barclays Bank v All NLR* 278.

Some have erroneously assumed that the notice must as a rule be distinct and filed separately in the registry after the suit has been filed. This is clearly untenable. Indeed, by insisting that it be filed at the “earliest opportunity”, the rules contemplate that the notice should ideally be contained in the party’s statement of claim or defence as the case may be. The usual practice is to incorporate the notice to produce in the pleadings thus: “The plaintiff/defendant shall at the trial rely on the receipt of payment of the 24th November, 2011. Notice is hereby given to the defendant/plaintiff to produce the original at the trial of this suit”.

The notice to produce may in fact be very informal like where counsel gives it to an opposing counsel without routing it through the registry of the court. What is material is evidence of the fact that the notice has been given. The rules themselves have specifically stated that notice to produce do not compel the production of the document. As Aguda has rightly noted, “it only affords the person serving the notice the opportunity to tender secondary evidence of the contents of the documents”.¹⁰⁵ Although the court could technically make an order that the document which is the subject of a notice to produce be produced under rule 6 of this Order, this is an order which the courts will seldom make.

A party who thinks that it is vital for his case for certain documents to be made available for inspection in court must do so by an application under rule 7 of Order 30 and not through the instrumentality of a notice to produce simpliciter. Such an order may be made at the discretion of the judge without the necessity of establishing that the applicant had first made a direct request for the document without success.¹⁰⁶ The decision in *Bongam Isa v Tasha L Lawrence & Others*¹⁰⁷ is

¹⁰⁵ Aguda op cit at 130.

¹⁰⁶ *S Emezue v S C Okenwa* (1970) 1 E C S L R 168.

¹⁰⁷ (2000) 1 CCLR Part 5 at 127.

significant in this domain for indicating the procedural position clearly.

Here, Justice R Wanki of the High Court Bamenda pointed out that a witness who is summoned to produce a document in court must if it is in his possession bring it to court. He noted that this has to be done regardless of any objection to its production or admissibility that the witness or his counsel may have noting that it is for the court to determine both after seeing the document. Equally significant is the view in this case that “a person summoned to produce a document without being summoned to give evidence does not become a witness by the mere fact that he produces the document.” However, the court has the power to order such a person to testify if the interest of justice so demands.

Interrogatories

Both the plaintiff and the defendant may file an application and obtain leave of court to deliver interrogatories in writing on the opposite party. Interrogatories are in essence questions drafted on any issue upon which discovery is sought by the other party. They are brought under Order 29 rule 1 of Cap 211. It is important to note that interrogatories cannot be resorted to where pleadings have not been filed in cases fought on pleadings. It will in fact be strange to adopt interrogatories in motions since the affidavit in support and counter affidavit will certainly provide all the answers that interrogatories would have elicited. Where appropriate, rule 3 of Order 29 insist that “the party interrogated shall answer the interrogatories subject to just exceptions”.

Interrogatories have not been dealt with in this book in detail because the procedure is largely extinct in Cameroon. The high courts will seldom grant leave for interrogatories in practice. For one, the parties themselves can where they consider it necessary engage bailiffs to issue interrogatories by way of process verbal often before the matter is filed in court.

This procedure is a peculiarly Cameroonian feature of civil practice where sheriff bailiffs operate as a professional business unlike in Nigeria where bailiffs are still court personnel. Secondly, interrogatories which are time consuming appear to be repetitive since they relate to getting answers which ideally should be elicited during the trial.

Affidavit Evidence & Documents: a procedural perspective.

An affidavit is simply evidence taken in written form and sworn before someone authorized by law to take evidence. True, most depositions/affidavits are sworn before the registry where the action is pending, yet, affidavits can legitimately be sworn before any notary and used in any court in the two Anglophone regions. The Bar law gives advocates call to practice as solicitors in the two regions the right to act as notaries and in so doing endorse affidavits in their chambers. Since such affidavits are as legal as those sworn before the registry staff of the high court, it will be patently unlawful for any judge to decline to allow them to be used in cases pending before the court.

Affidavits are used both in substantive actions like the part 8 proceedings/originating summons and in interlocutory motions. It is trite law that any paragraph of an affidavit averring to facts which has not been specifically challenged in the other party's counter affidavit is deemed to be admitted. It was thus held by Moma JCA in *Allen Brown*

& Others v Juliette Ndenge Che & Anor¹⁰⁸ at the court of appeal that since the applicant did not expressly challenge the averment in the affidavit of the respondent, those facts are deemed to have been admitted. Clearly therefore, a party acts in futility if he seeks to use legal submissions or oral evidence

¹⁰⁸ (2005) 1 CCLR 10.

to contradict an unopposed fact in the affidavit of the other party.

It is standard practice of universal acceptance for a party to rely on documentary evidence in affidavits. Where a document is cited in an affidavit, it is incumbent on counsel to annex the said document as an exhibit in the action. Such an annexure should ideally be endorsed with a statement on the reverse side of the exhibit thus: “This is the document referred to in paragraph 5 of the affidavit as exhibit ‘A’ ”. This perfectly simple and straightforward issue that documents be annexed and endorsed is not open to any dispute.

Equally plain and indisputable is the fact that the party need not annex the originals of the document to which reference has been made in an affidavit. A copy of the document is sufficient except in OHADA simplified proceedings. This issue was neatly raised and dealt with in *Cameroon Tea Estate v S Tamnjong Simon Nformi & 73 others*¹⁰⁹ which has been reviewed in detail here because of the important legal principles addressed by counsel during the arguments of the case. The applicant filed a motion supported by an affidavit of 8 paragraphs sworn to by counsel to which was attached one document exhibit A which is a “requête aux fin de Renvoi”.

During arguments counsel for the applicant stated that exhibit ‘A’ shows unequivocally that an application for stay of execution was filed before the Supreme Court on the 19/9/2009, and so far the matter had not been heard. Counsel contended that though they had received a counter affidavit from the respondents this did not debunk the fact that the application for change of venue was duly filed. He submitted that the only reasonable decision for the court to take was to stay the proceedings.

¹⁰⁹ SUIT N0 CASWR/L.14/2009/1m Unreported

On his part Counsel for the Respondents submitted that the application before the court was not grounded on any known law because section 41 of law N° 2006/0161 of the 29/12/06, to lay down the organization and functioning of the Supreme Court did not state that an application for transfer of venue must necessitate a stay of pending proceedings in a lower court. Additionally, counsel submitted that exhibit ‘A’ attached to the affidavit is a photocopy and is neither primary nor secondary evidence for the court to rely on. Counsel also submitted that exhibit ‘A’ did not fall within the catalogue of things that the court could take judicial notice of.

Replying on points of law counsel for applicants contended that as far as exhibit ‘A’ was concerned the court could take judicial notice of the practice before this court whereby the court adjudicates on motions supported by photocopies of documents, and that should the court be minded to countenance the submission of Counsel for the respondents then he was urging the court to apply the provision of section 162 (5) of the labour code which empowers this Arbitration Board to seek information by every means. Counsel also submitted that the provisions of section 41 on the Organization of the Supreme Court were a rider to the general jurisdiction that is given to the lower courts.

Based on these interesting submissions, Mbeng JCA held without any hesitation that “the issue raised by Counsel for the Respondents that exhibit ‘A’ is a photocopy is to my mind of no moment”. The learned justice of the South West Court of Appeal affirmed in his characteristic frank manner that the “practice of the courts over the years in the Anglophone courts is that photocopies of documents are attached to affidavits”. If the Respondents wanted to challenge the authenticity of exhibit ‘A’, Mbeng JCA noted “they should have done so by swearing an affidavit”. The court concluded that as “far as this court is concerned it finds nothing wrong with exhibit ‘A’”.

Hearsay Rule

The admissibility of evidence during hearing particularly with regards to documents raises serious procedural consideration which should be addressed in this book. At common law, the rule which is incorporated in the Evidence Ordinance applicable in Anglophone Cameroon is that subject to certain exceptions hearsay evidence both oral and documentary is inadmissible. What then is hearsay evidence? It is in substance evidence given of a statement or opinion made by another person or of events which the witness testifying does not have personal knowledge of where it is sought to rely upon it as the truth.¹¹⁰

It has been regarded as a rule against narratives. The hearsay rule forms part of Cameroonian law because section 76 of the Evidence Ordinance which asserts that “oral evidence must, in all cases whatever, be direct”. Based on this provision, if evidence is on a matter which could be heard it must be evidence of a witness who heard the fact, if it was spoken, it must be the speaker who should testify, if it is on what was seen it has to be given by the person who saw the event. If however, it is written in a document it has to be given or tendered by the maker if the idea is to establish the truth of the testimony. That hearsay evidence should be treated with suspicion makes sense because as was pointed out by counsel in *Mbuta A William & Anor v Kontchou Ernest* (trading under the name and style of Auyerge)¹¹¹ and acknowledged by the Court of Appeal, hearsay evidence besides not being on oath is unhealthy since the party against whom it is sought to be given has no opportunity to cross examine on it.

Hearsay rule has however to be contextualized in Cameroon because of the country’s peculiarities. The point being made here was illustrated in *Mbuta A William & Anor v Kontchou*

¹¹⁰ Sime op cit at 335.

¹¹¹ 118Suit No CASWP/46/2004 Unreported.

Ernest (trading under the name and style of Auyerge)¹¹². A gendarmerie report which was tendered in a criminal case to which was attached a civil claim was on appeal attacked for allegedly being hearsay because the gendarme who made it was not called at the trial. The court of appeal contextualised this contention and rejected this submission on the reasoning that although the court relied heavily on the report in finding the appellant 100% reliable in negligence for making a U turn in the highway under item 51 special cases CIMA Code, the report was admissible. The court held that:

“The report was made by judicial police officers. Although their reports are not meant to be evidence but serve as mere information as stipulated in section 91 of the Criminal Procedure Code, such reports cannot just be thrown away as good only for the dust bin. As Judicial police officer it is presumed that they recorded just what they saw and heard.”

This decision is significant for the penultimate sentence in the above quotation which says the report is presumed to be correct. Since the report raises in the judgment of the court of appeal a presumption that its contents are correct, it follows that evidence may be called to rebut the presumption. Evidence by a bailiff who went to the scene and drew a report as to cause of accident can rebut the report of the judicial police on cause of accident.

There are no hard and fast rule regulating this matter since it is in the discretion of the judge. The judge will however take certain factors into consideration before reaching a conclusion. Firstly, the report by the gendarmes and police are made pursuant to a public duty and not officially paid for by the

¹¹² Suit No CASWP/46/2004 Unreported.

parties so in theory are less likely to be influenced.¹¹³ Bailiffs operate like a business and prepare their report after being commissioned by clients who pay them for their service and may tend to slant their report to support their clients. All in all, the court takes the decision based on what the judge perceives to be consistent with the truth and in so doing is less likely to rely on a report which was prepared after the event.

This decision of the Court of Appeal, Buea affirms the standard hearsay position which was stated by the Privy Council in *Subramaniam v Public Prosecutor*¹¹⁴ that evidence is not hearsay where it is being adduced to establish not the truth of the statement, but the fact that the statement was made. Often some courts misunderstand the hearsay rule and overrule questions during evidence without first considering the purpose for which the evidence sought to be elicited is given.

Experts

Certain trials raise issues requiring the resolution of questions with artistic, scientific or technical ingredients. It is in fact common to have cases which require technical and sophisticated evidence which can only be given by an expert. Where this is the case, it will be the responsibility of the party who requires such technical or special evidence to call an expert to adduce it. Sime¹¹⁵ has indicated that “a person is an expert if he or she is skilled in the field in question through qualifications or experience” noting that a “car mechanic may be an expert through experience with working with cars”. The author warns that a person with paper qualification but little experience should not be solicited as an expert because “even if

¹¹³ Judges who do not live in space know the common practice that judicial police reports can hardly be written and transmitted to the insurance company and the state counsel where a party fails to pay for the service.

¹¹⁴ (1956) 1 WLR 965.

¹¹⁵ Sime *op cit* at 316

accepted by the court as an expert, his or her opinion is unlikely to carry much weight”.

The Cameroonian position on this issue was stated in the Maurice’s case¹¹⁶ where the court of appeal Buea held that:

“Although it was decided in the case of Ado Kofar Wambai case cited by counsel that the expert must give his qualification and experience before he begins to give his evidence, in our country to be an expert you must be sworn in as such on the particular field”

Nana JCA who expressed the above view had in the Mbuta A William’s case also held that a provincial delegate for transport was an expert with regards to the nature and categorization of driving licenses. The judge justified this decision on the fact that “this was the officer responsible for issuing driving licenses in the then South West Province”. After so finding, Nana JCA accepted the evidence of the delegate as expert opinion since it was not challenged by another expert. In doing so, the judge re-affirms the principle that “the court is not bound to accept the opinion of an expert and act on it” but must do so when such evidence is not challenged by the opinion of another expert. The issue here as it is in England and Nigeria is that experts are not defined exclusively in terms of qualifications.

Where an expert relied on plans, survey reports and photographs such should be tendered and made available to the other party to examine. This rule is predicated on the requirement of the rules of fair hearing which demand that a decision should not be based on a report which the other party did not know of its existence. A court of appeal is certain to reverse a decision based on a report to which the other party

¹¹⁶ (2012) 1 CCLR 77.

had no knowledge unless it may be shown clearly that there is other evidence to support the judgment.

Service of Process

Introduction

All court processes commencing proceedings including those relating to interlocutory proceedings in existing actions must be served on the opposing parties. The opposing party may be styled as defendant(s) or respondent(s) as the case may be. Service is ordained by Order 9 Rule 1 of the Rules of Court CAP 211 and the provisions in the pre-amble on fair hearing when read together with Article 65 of the constitution 1996 as amended.

The defendant can only appear in court after being served with the writ or other relevant commencement process. Service is the legal notice to the defendant that he has a case which is pending in court against him. It is at the same time an invitation that he should appear to answer to the claims in the process on the date specified in the process. Service is critical. It is an essential foundation of the golden rule of practice that the opponent should not be taken by surprise. Because a person cannot be condemned unheard, the importance of service as the first action in the judicial process cannot be over-emphasized.

It was in the Buea court of appeal decision in *Njoh Litumbe (Representing the Bakweri Land Claim Committee (BLCC) v Bakweri Cooperative Union of Farmers* held that service of the other party in a suit is a fundamental issue and a key requirement of the principle of fair hearing. Service of a process is an exact thing which must be undertaken with all the exactitude or exactness in the judicial process. In the case under reference an originating summons was served on the

appellant by substituted service through publication in a newspaper at the lower court. On appearing in court to defend the action, the trial court denied the defence audience when the 8 days for appearing in originating summonses had not expired. Based on the above, Asuabgor CJ held that:

“By a simple arithmetical calculation it is clear that the appellant who was served by substituted means on the 19/9/03 had up to 27/9/03 to enter appearance in the Originating Summons. This was a right given to the appellant by the law. It was not a case within the discretionary powers of the Court to grant or refuse an adjournment. It is therefore our opinion that the refusal by the trial Judge to grant the adjournment prayed for by Barrister Ebuh George of Counsel for the appellant was wrong as it was a deliberate denial of justice. We also agree with the submissions of Counsel for the appellant that the decision by the trial Judge to proceed to hear Suit No. HCF/144/OS/2002-03 on the 24/9/03 in the absence of the appellant amounted to a serious irregularity in the proceedings.”

Apart from amounting to notice to the adverse party in our adversarial practice, service is vital for other reasons. Indeed, it was stated in *Dr N E Okoye & Anor v Center Point Merchant Bank* that “service of origination processes such as the Writ of Summons on the Defendant is a fundamental condition precedent to the court’s exercise of its jurisdiction to hear and determine the suit”. This means that a court acts in futility if it takes any decision in an action in which the court process has not been served on all the parties in the action. The Supreme Court rationalized this position in the Okoye case above by stressing that “any judgment or order given against a defendant without service is given without jurisdiction and therefore null and void.”

Service technically refers to the delivery of the process to the opposing party and aims at bringing the action against him/her to his/her knowledge. As a cardinal rule, except in the exceptions discussed below, service has to be personal in the sense that the process is handed over to the defendant/respondent in person. Service meant for a son delivered on the mother or for a husband delivered on the wife is in the absence of an express order of court authorizing it incurably bad at law. The party serving has the duty to establish that the process was served. It is thus idle to argue that the defence had knowledge of the suit by some other means other than a proper service of the court process on the defence. An argument in *Njoh Litumbe (Representing the Bakweri Land Claim Committee (BLCC))*¹¹⁷ v *Bakweri Cooperative Union of Farmers* that the appellant had been aware of the suit against him because defence had briefed counsel and had also sent out a press release about the suit in a web-site was rejected by the court of appeal as unmaintainable in law. Indeed, Asuagbor CJ castigated the trial court's opinion that because the appellant proved that he was aware of the suit filed against him by briefing counsel and sending out a press release as seriously erroneous.

It is worth noting that unlike in Nigeria where under Order 9 it is a court bailiff that effect service, the case in the courts in Cameroon is different. Under Decree No 79-448 of 5th November, 1979 as amended by Decree No 85-238 of 22 February, 1985 court process are served by public bailiffs for a fee negotiable between the litigant and the bailiff concerned. These bailiffs run private offices across the nation organized in a manner similar to lawyers firms. It is by this legislation plain that the courts in Cameroon unlike their counterpart in Nigeria no longer have court bailiffs attached to them. Based on the

¹¹⁷ Suit No CASWP/8/2004.

above, service done by a court official in the absence of an express order of the court is ineffective and bad.

Although service invariably has to be personal, Order 9 Rule 16 allows a process to be dropped as near as possible to the person to be served in certain circumstances. As it might rightly be deduced from Nana JCA's decision in the Blassius case, where the person charged with the service is prevented by violence or threats of the person to be served or of any other person in concert with him from effecting personal service, it is sufficient to inform the person to be served of the nature of the writ or other document and drop the document as near to the person as practicable. A writ dropped in such circumstances in the manner stated above is regarded as personal service.

Order 9 Rule 19 it should be added expressly provides that service effected on a Sunday or public holiday is bad at law where it has not been endorsed by an order of a judge. A judge will endorse such service in cases where there is reasonable apprehension that the opposing party is about to flee the jurisdiction to avoid the suit. The endorsement may be done on an informal application to the judge which could in fact be oral.

Irregular service

Traditionally, service can only be effective when done in strict compliance with the rules of court. Personal service should be effected on the party in person or through its accredited representative while substituted service must be effected in the strict manner prescribed by the order of court. Where service is not done properly the service is regarded as irregular. What is the consequence of irregular service? The answer to this question is fairly straight forward. It will depend upon the circumstances of each case. A distinction has been drawn between a failure to serve the process and service of the process in an irregular manner in the Okoye case with the

court holding that while the latter is fatal, the former is a mere irregularity which may be cured.

It is clear from a careful reading of the Njoh Litumbe case that irregular service can be cured. This is consistent with the decision in the English case of *Singh v Atombrook Ltd*¹¹⁸ that a service effected irregularly could be cured. Asuagbor CJ had in fact in the case under reference pointed out that “now the trial Judge had the opportunity to cure that irregularity when he heard Motion on Notice No HCF/144/OS/0203/2m/03 filed by the appellant praying that the default judgment be set aside.” This shows clearly that the irregularity involved although described as fundamental was such that it could be cured by the court. Under our rules therefore such irregular service can be cured by an order of court deeming it as proper. The court can do so under the undoubted inherent jurisdiction of the court and pursuant to Order 52 rule 2 of Cap 211. The latter provision gives the court a wide discretion to make any order that will lead to achieving substantial justice in the case.

It is clear that a party who discovers that service has been done irregularly should take steps to cure it promptly. Irregular service or service that is completely bad at law cannot under the rules of court and the jurisprudence surrounding the subject be used as a ground for dismissing a suit. Once the court that issued the process has jurisdiction to do so, the process (writ, petition, motion) is valid and cannot be declared void because of irregular service.

The law is clear. The validity of the writ in a regular suit is one thing and the regularity of the service of the writ yet another. It was for the present reason held in *Alexander Nze v Nigerian Port Authority Port Harcourt*¹¹⁹ that an irregular service or out rightly bad service may by order of court be set

¹¹⁸(1989) 1 WLR 810.

¹¹⁹ Supra. Author was counsel to the defendant in the Court of Appeal, Port Harcourt.

aside or cured but can never become the basis for dismissing an otherwise validly issued court process. In the case under reference, the court dismissed a defence motion to dismiss the action on ground that the service was done in Port Harcourt instead of Lagos as was specifically prescribed by the Nigerian Port's Act.

The court relying on the Supreme Court decision in the Nwabueze's case held that the irregularity of the service has not vitiated the valid writ of the high court. It was also held that the plaintiff who had taken steps in the action had lost the right to object to the irregularity. In matters such as this, once a valid court process has been issued, the irregularity of the service of the process does not affect the competence of the process itself.

The situation is however different in matters under the OHADA Uniform Acts on the simplified recovery measures. Under the latter, it is clear that OHADA actions as was stated in *SIC CACAOS v Soppo Soppo Jean*¹²⁰ are brought under a special procedure which is strict. This being the case, irregularity in the service may be fatal "because the procedure under the Uniform Act ... is special and strict". It was in this case held that "where this procedure is commenced, the court is bound by its provisions" which will include of course those relating to service.

Substituted Service

As has been indicated already, there are two types of services viz personal and substituted service. It is sometimes practically impossible for the defendant to be served in person as the defendant may amongst a variety of other reasons be evading service. Where this is the case, it is usual for the court to order that such a defendant be served by means other than personal service. Although in practice the courts usually re-

¹²⁰ (2009) 1 CCLR 31.

quire evidence that attempts has been made to serve the defendant personally without success before ordering substituted service, Aguda¹²¹ who is an authority in this domain has argued that this is not an inflexible rule.

Order 9 Rules 5-7 of the Supreme Court Civil Procedure Rules nevertheless provides that application for substituted service be made by motion *ex parte* supported by affidavit indicating the basis upon which the application is made. In spite of what Aguda says, good practice suggests that counsel ought to provide evidence justifying the option for substituted service. Indeed, it was held in the Okoye case that “the primary consideration in an application for substituted service is as to how the matter can be best brought to the attention to the other party concerned”. This being the case, the court must be satisfied that the mode of service proposed would probably; after all practicable means of effecting personal service fails bring the action to the notice of the other party.

Relying on the incontestable principle that where personal service is impossible for no fault of the plaintiff the court will order substituted service, Ngang J of the High Court Buea held that the respondent could be served by substituted service in *Dr. Mboudou Germain Marie Moneperance v Marytou Baldet Mamadou*.¹²² He thus ordered the respondent in a petition for the dissolution of marriage to be served by publication in *The Post News Paper* based in Buea. The order for substituted service must be scrupulously respected. This principle comes across in *Njoh Litumbe (Representing the Bakweri Land Claim Committee (BLCC) v Bakweri Cooperative Union of Farmers*¹²³ It is plain that substituted service cannot be ordered by the court where at the time the process was issued and ready for service it was not possible to serve the defendant personally.

¹²¹ Aguda *op cit* at 7.

¹²² Suit No. HCF/055/2011/11m/11 unreported

¹²³ *Supra*.

Clearly, Order 9 rule 5 has indicated that “where it appears to the court (either after or without an attempt at personal service) that for any reason personal service could not be conveniently effected,” the court may order that service be effected either by delivery of the document to some adult inmate at the usual or last known place of abode or business of the person to be served; or by delivery thereof to some person being an agent of the person to be served, or to some other person, on it being proved that there is reasonable probability that the documents would in the ordinary course, through that agent or other person, come to the knowledge of the person to be served. The same provision allows service to be done by advertisement in the Gazette, or in some newspaper circulating within the jurisdiction; or by notice put at the principal court house of, or some other place or public resort in the judicial division wherein the proceeding in respect of which the service is made is instituted, or at the usual or last known place of abode or of business of the person to be served.

It is by rule 6 of Order 9 noted that “when the party to be served is in the service of another department of Government or of a native authority the court may transmit the document to be served and the copy thereof to the senior officer of the department of Government in the judicial division or place where the party to be served works or to the native authority in whose service is the party to be served, and such officer or native authority shall cause the same to be served on the proper party accordingly”. The practice with regards to “where partners are sued in the name of their firm,” is provided for in Order 9 rule 7 under which “the writ or other documents shall be served either upon any one or more of the partners, or at the principal place within the judicial division of the business of the partnership upon any person having at the time of the service the control or management of the partnership business there; and such service shall be deemed good service upon the firm.”

By rule 8 of the same Order 9 “when a suit against a corporation or company authorized to sue and be sued in the name of an officer or trustees, the writ or document may be served giving the same to any director, secretary, or other principal officer or by leaving it at the office of the corporation or company.” The situation with suits “against a foreign corporation or company having an office and carrying on business within the jurisdiction and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving the same to the principal officer of such foreign corporation or company within the jurisdiction whereas by rule 10 “where the person on whom service is to be effected is living or serving on board of any ship, it shall be sufficient service to deliver the writ or document to the person on board who is at the time of such service apparently in charge of such ship.” This is usually the ship captain or his deputy.

The case of service on prisoners is straightforward and regulated by rule 11 of Order 9. By this provision, prisoners or a lunatic in an asylum shall be sufficiently served by a delivery of the writ or document at the prison or asylum to the superintendent or person appearing to be the head officer in charge thereof. In all situations proof of service is by an act of the bailiff who executed the service.

Pleadings

Pleadings are concise written statements of facts upon which parties in civil actions rely to establish their case or their defence to their opponent's case. There are generally used in the high courts although counsel sometimes adopts them in magistrate court actions. Pleadings generally and traditionally include: statement of claim, statement of defence, counter-claim, replies and petitions. It was in the context of the Anglophone regions held in *SAGA Cameroon v Mokom Ngu Eric* that an application for a writ of summons is a pleading. It must be pointed out however that a prayer in a motion paper and the affidavit and counter affidavit in support or opposition respectively have on occasions been judicially recognised as playing the same role of pleadings.

Pleadings are by Order 3 Rule 1 of the Supreme Court Rules mandatorily required in actions in high courts except in the rear case where a plaintiff is unrepresented by counsel. The drafting of pleadings ought for this reason to take cognisance of the need to ensure its conformity with the rules regulating pleadings. There is an increasing tendency by the courts to insist on a scrupulous respect of the principles of pleadings. Before delving in greater details with the content and nature of pleadings, it is imperative to discuss certain preliminary matters which must be considered prior to the drafting of pleadings.

Principal Character of Proceedings

The essential attribute of every pleading has been graphically indicated in Order 32 rules 5 and 6 of the Supreme Court Rules with the later stating thus:

“Every pleading shall contain a statement of all material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a separate allegation. The facts may be alleged positively, precisely and distinctively and as briefly as is consistent with a clear statement”.

The first part of Order 33 rule 5 identifies a very critical element of pleadings when it asserts that “pleading shall contain a statement of all material facts on which the party pleadings relies”. What is the importance of this statement? And what in practice do we need to do to ensure that this lofty adjectival ideal is attained?

It is perhaps necessary to begin with an attempt to answer the second question before proceeding to the first. Since it is impossible to formulate good pleadings (statement of claim or statement of defence) without first thoroughly reviewing the legislation and authorities on the issues in controversy, it is excellent practice to extensively read the relevant case law before preparing one’s pleading. A statement of claim, statement of defence or petition drafted after a careful study of one that has succeeded in a previous case is most likely to succeed. A statement of claim for example in trespass to land formulated after reading a variety of decided cases on trespass is sure to avoid the pitfalls that made one of the parties fail!

With regards to the issue of “the entire material facet”, it is important to note that this statement was used advisedly. Since as it was clearly stated in the SAGA Cameroon case that evidence cannot be led to establish an un-pleaded fact, it is always better to veer on the side of caution and plead as much facts as one can reasonably do. A pleading which has surplus facts may appear unwieldy but this in itself cannot be in any

way prejudicial to the case of the party since it obviously cannot be a ground for any claim or defence failing.

Often, whether a case succeeds or fails is largely dependent on the pleadings in the statement of claim and or statement of defence. Bawak JCA as he then was articulated this foundational principle of practice in *Pierre Tchanque v Paul Sinju*¹²⁴ with reference to a statement of defence thus:

“Defendants must plead all facts which according to him will show the action not to be maintainable or that the transaction is either void or voidable. The defendant must specifically plead and particularise such defences as fraud, limitation, release, illegality, performance...”

After the above statement of the law, his lordship dismissed the appellant’s appeal in the case concluding that it was “not open to the defendant to rely on defences which he should have but had not pleaded”. This conclusion about the dire consequences of not pleading all the material facts applies with equal force to statement of claims, petitions etc. and should be taken rather seriously.

The rule that a statement of claim must plead all the material facts also applies to the relief sought. It was thus held by the Bamenda Division of the Court of Appeal in *Nyinmah Evelyne & 2 Others v Kemende H & 10 others*¹²⁵ that the statement of claim should specifically plead the relief the plaintiff claims noting that “any relief not mentioned shall be deemed to have been abandoned without regards to the endorsement on the writ”. It is because of this reason that it is advisable for the application for the writ of summons to be formulated so comprehensively that it is only adopted as a statement of claim when pleadings are ordered!

¹²⁴ (2002) 1 CCLR 95

¹²⁵ (2005) CCLR 97

Rules of Pleadings

The rules of pleadings are derived from the rules of court and practice distilled from decided cases. It is plain from Order 32 rule 6 of the Supreme Court rules Cap 211 these rules include the requirement of pleading the broad facts and not law or evidence etc. In spite of the decision of the court of appeal in *SONEL v Bunkas Lucas*¹²⁶ that pleadings must state facts and not law, it must however be noted that it is possible to plead and rely on law in appropriate cases. A defendant can in his pleading legitimately rely on a statute of limitation as providing absolute defence to the claim against him. It is perfectly permissible for the defence to plead thus: “The defendant shall at the trial contend that the action is barred under section 2(1) of the University of Buea Act because it was commenced more than 3 months from the accrual of the cause of action”.

Counsel must in particular be circumspect in drafting their statement of defence. As an inflexible rule, every averment in the statement of claim must be specifically denied else it would be deemed to have been admitted. It is therefore clearly bad pleading to aver that “the defendant is not in a position to admit or deny the averment in paragraph 5 of the statement of claim”. It was thus categorically held in *Odiba v Azege*¹²⁷ at pp 121 that “it is settled law that a refusal to admit or deny an opponent’s pleadings in the statement of defence does not raise an issue of fact”. This in other words means the statement of fact which was answered by such an averment in the statement of defence has not been traversed.

Pleadings are necessarily regulated by well-defined rules as indicated in *Nyengah Evelyne and others v Kemande Henry Gamsey*¹²⁸. It cannot be expected to be otherwise because of the rather crucial role of pleadings in defining the issues in

¹²⁶(2001) 2 CCLR 162.

¹²⁷ (1998) 7 SC

¹²⁸ (2005) ICCLR97 held 1.

dispute between the parties in a civil action in all courts of records. The rules of pleadings are derived from a variety of sources including the rules of court, case law and the Evidence Ordinance received from Nigeria.

A major rule of pleading is the principle that facts that have been positively alleged in a statement of claim or affidavit in support of an originating process and admitted by the other party either expressly or by implication need not be proved. By section 74 of the Evidence Ordinance applicable in the Anglophone regions it is superfluous to lead evidence to establish that which has been expressly admitted in the pleadings. An alert judge will not allow such an unnecessary time wasting practice.

As a rule, pleadings enable each party to give notice of the case to the other. This enables each party to prepare his case in advance in terms of the golden rule of practice beautifully captured in *George and others v Dominic former mills*¹²⁹. A person shall not be allowed to lead evidence on matters not pleaded as was categorically held by B Bawack JCA in *SAGA Cameroon v Mokom Ngu Eric*¹³⁰ since to do so will be taking the other party by surprise.

Evidence which is at variance with pleading goes to no issue and therefore inadmissible either at the trial or on appeal. However, where the evidence has already been recorded, the party may bring an application to amend the pleadings to conform to evidence on record. Pleadings bound the parties and the parties cannot depart from them to make a different case at the trial.

Statement of Claim

It is the responsibility of the counsel for the plaintiff to prepare and file a statement of claim which is the pleading

¹²⁹ (1965) 1 All NLA.

¹³⁰ (2002) ICCLR

upon which he/she predicates his/her case. The time for preparing and filing the statement of claim has not been specifically indicated by the rules of court. What happens in practice is for the party to ask for the time to file it at the time when the pleadings are being adopted under Order 32 Rule 1 of CAP 211.

As might be expected, the time given to the plaintiff will depend on the particular circumstances of each case. Generally the more complex the case, the longer will be the time given. The time frame allowable for the filling of a statement of claim is entirely at the discretion of the court. A judicious exercise of this discretion will result in a grant of from a few weeks to a few months for the filling of the statement of claim.

Contents of a Statement of Claim

The statement of claim should as a pleading be a summary containing in the words of Order 33 Rule 5 of the rules all the materials facts. The statement of claim must in terms of this rule and the practice over time be divided into paragraphs numbered consecutively with “each paragraph containing as nearly as may be” a separate allegation. When read alongside rule 6, a statement of claim should be drafted comprehensively covering as it were every factual element of the claim. Precision, distinctiveness and clarity in stating facts relied upon in the various paragraphs of the statement of claim are basic features in the statement of claim.

Clarity in drafting the statement of claim and the statement of defence is critical as B. Bawak JCA as he then was stated in the Bamenda Court of Appeal decision in *Saga Cameroon v. Mokom Nji Eric*¹³¹. This is so as the court noted because the issues at stake and the ultimate decision by the court depend largely on the nature of the pleadings filed. It was thus held in this case that “neither party will be allowed to raise at the trial

¹³¹ (2002) ICCLR 95

of the suit an issue which has not been pleaded.” Whilst the law requires that both parties be heard, neither of them shall be allowed to surprise the other by raising unforeseen issues not contain in the pleadings the court of appeal rightly noted.

Sometimes, a statement of claim may be so poorly drafted that it fails to disclose a cause of action. Where this regrettably occurs, the defence will simply bring an order 28 application to dismiss the action without the necessity for filing a statement of defence. The case of *Offiong v IBWA*¹³² emphasizes this point graphically. The plaintiff had filed his suit against the defendant claiming One Million Naira damages. The statement of claim merely pleaded facts showing that the plaintiff issued a cheque for 150 Naira but the bank in error paid the person to whom the cheque was given 650 Naira.

It was also pleaded that on seeing the error, the plaintiff wrote to the bank asking it to pay him damages for the errors of over paying the cheque holder. Rather than doing so, the bank opted to credit the plaintiff's account with the amount which the cheque holder was over paid. On these facts, counsel moved the court to dismiss the action on grounds that the statement of claim did not disclose a cause of action. Counsel argued based on the principle in banking law that the money in the account which was overpaid to the cheque bearer was the bank's money and since the plaintiff did not plead that he had issued a cheque which was refused payment because the money was not in his account, there was no cause of action. The court dismissed the suit noting that had the plaintiff indicated in his statement of claim that he was refused payment on a cheque issued for reasons of the bank over-payment the bank's would have been liable. This decision is unchallengeable as *Emeli JCA* as he then was had categorically stated in the *Buea Court of Appeal in Nehe Che v The People*¹³³ “that money in a

¹³² Unreported decision High Court 7 Calabar.

¹³³(1994) CAJ- CLC 31.

customer's account remains the property of the bank and not the property of the customer," such that if stolen it is the money of the bank and not the property of the customer that has been stolen."

The statement of claim is filed after the application for a writ of summons has been filed and served. The statement of claim is subject to the principle in *Renowden v Mc Millan & Anor*.¹³⁴ Under it, high courts of Anglophone Cameroon insist that a claim not specifically stated in the statement of claim is considered abandoned even where it was contained in the application for a writ of summons. It is thus absolutely vital for the statement of claim to clearly indicate the claim or claims of the plaintiff otherwise the court will not make the award on the principle that courts would not grant orders not specifically prayed for.

Order 3 rule 6 of Cap 211 states that in actions involving declaration of rights under any contract or instrument or to set aside any instrument or requiring that "any bond, bill, note or instrument in writing be delivered up to be cancelled, or to restrain any defendant by injunction or to have an account taken" the party seeking these relief or relieves must attach and describe any document which he/she relies on. This rule of practice which in practice is rarely resorted to is significant since the use of a document not so described and attached to this specie of pleadings can be the basis of an objection that the unattached document should not be admitted during the trial. However, it is plain from the phrase that "or may state any reason for not annexing copies" which he out to" that the failure to annex the document is not fatal. The court has discretion to accept the reasons given and admit a document pleaded but not annexed as required under rule 6.

Although rarely resorted to in practice, the judge or registrar of the High Court may under Order 32 Rule 2

¹³⁴ (1970) 123 CLR

dispense with the filling of a statement of claim. This provision permits the judge or registrar to “take from each party or from the barrister or solicitor to each party and record a short statement of the facts and pleas upon which such party relies”. This is according to this rule to curiously enable the courts and the parties to know as far as possible what the claim is.

Statement of Defence

The statement of defence is the summary of the facts constituting the defence that the defendant intends to rely on at the trial to ward off the claims of the plaintiff. It is a very important pleading which should be handled with the seriousness it deserves. What should the typical statement of defence set out? One must turn to order 32 rules 9-14 of the rules of court Cap 211 to answer this question.

Dealing with the absolute need for the statement of defence to be comprehensive, rule 9 of Order 32 insists that the defence “shall deny all such material allegations in the petition as the defendant intends to deny at the hearing”. A defendant ignores this rule at his/her own peril since the penultimate sentence in this provision warns that allegations of fact in the statement of claim not specifically traversed by the defence are deemed to be admitted. Rule 10 clearly requires the defence to deal specifically with allegation of facts raised by the plaintiff while rule 11 demands that the defence should not limit itself to mere denials noting that it must answer the point of substance raised.” As a rule, the defence must plead quite clearly facts that explain and answer the allegations raised in the statement of claim. This is often done thus: “the defendant shall in further answer aver that he purchased the car...”

It was in *Pierre Tchaque v Paul Sinju*¹³⁵ held by Bawak JCA in the court of appeal Buea that it is not open to a defendant to rely on a defence which he should have but had not pleaded.

¹³⁵ Supra

The defendant in this case lost the case for failing to plead the defence that the loan transaction on which he was sued in the case offends the Money Lender's Act. The court of appeal in fact held that "the defendant must plead all facts which according to him will show the action not to be maintain- able or that the transaction is either void or voidable or all such grounds of defence which if not so pleaded would be likely to take the plaintiff by surprise."

The statement of defence may not however be limited to the allegation of facts averred in the statement of claim. It is in fact excellent practice for the statement of defence to allege any facts not stated in the statement of claim where such facts establishes for instance fraud on the part of the plaintiff or facts showing "that the plaintiff's right to re- cover or to any relief capable of being granted" in the suit "has not yet accrued or is released or bared or otherwise gone".¹³⁶ It is clear from the above that counsel should be ingenious in drafting the statement of defence taking into account all considerable possibilities.

In spite of what had been said above, counsel must adopt a responsible and dignified attitude in drafting the statement of defence. The rules require the statement of defence to clearly admit that which in the circumstances of the case is indisputably true. Although a failure to admit an indisputable fact may not be fatal yet it carries consequences for the pleader. Under Order 32 rule 17 the court is enjoined to award cost against a party who in the opinion of the court denied that which ought to have been admitted. This discretion can be exercised by the court to award cost against a defendant even where the latter emerges victorious at the end. Cost in this case is rationalized on the basis of the time and effort expended to establish a fact that ought to have been admitted.

Set-off and counter-claim

¹³⁶ See Pierre Tchanque's case *supra* at pp 123.

Order 32 rule 14 of Cap 211 categorically requires the pleader to specifically plead the set-offs and counter claims a party intends to rely on at the trial in the statement of defence. Under this provision, “where any defendant seeks to rely upon any facts, as supporting a right of set off or counterclaim, he shall, in his statement of defence, state specifically that he does so by way of set – off or counter claim, and the particulars of such set – off or counterclaim shall be given.” The usual practice is for the statement of defence to plead the facts upon which the set-off or counter-claim is based in some of the paragraphs of the statement of defence without necessarily creating a sub title for the relief in the statement of defence. It is good practice for the pleader to indicate in the defence that the defendant shall by way of a counter-claim rely on the averments in paragraphs....of the statement of defence.

Both reliefs are useful in fighting off the plaintiff's claim but are clearly not coterminous. A set-off is an exclusively monetary claim deployed by the defendant as a defence to the plaintiff's claim as conceived in the latter's statement of claim. The counter-claim on the other hand is an entirely self-sustaining claim by the defendant against the plaintiff with the only difference being that the counter-claim is brought in the action of the defendant. The set-up is more in the nature of a shield which operates only as a defence to the plaintiff's suit while the counter-claim is a sword that is used to attack the plaintiff¹³⁷.

Because the counter claim is distinct and independent, it follows that it should not be used as a defence in actions brought under the simplified procedure for the recovery of contractual debts under the OHADA Uniform Acts. This principle is peculiar to Cameroon when compared to the practice in Nigeria. It was held by the court of appeal in SIC

¹³⁷ Aguda op cit at 103.

CACAOS v Soppo Soppo Jean¹³⁸ that the judgment of the trial high court in favour of the respondent who had counter-claimed for an amount in proceedings under the simplified procedure rules must be set aside. The court justified the decision on the grounds that “the second arm of section 12 OHADA law envisages is an examination of the petition or claim of the petitioner and not of the opposing party”. Continuing along these lines the court insisted that “a counter claim is an independent claim” which under the OHADA dispensation should be brought in a different suit.

It was in this case concluded that “as soon as the trial court finds that an opposition has been filed that the petitioner has not proved his case he should dismiss the case by a ruling”. After holding that this will not preclude the petitioner from filling an ordinary suit for the same amount, the court castigated the trial court for awarding the sum claimed in the counter-claim for being “contrary to the spirit of article 12 of the Uniform Act on Simplified Procedure¹³⁹”.

Matters Which Must be Specifically Pled

The rules of practice that have developed over the years in the courts of this region require certain facts to be specifically pleaded both by the plaintiff or the defence as the case may be. A party who wishes to rely on such facts in support of his case is thus obliged to raise them in his pleadings and state the relevant factual circumstances upon which these are predicated. It is obvious from the decision of the Nigerian Supreme Court in *Rasaki Oshodi & Others v Yisa Osemi E & Another*¹⁴⁰ that limitation of time, estoppel par rem judicatam etc must be

¹³⁸ (2009) 1 CCLR 31.

¹³⁹ See held 3.

¹⁴⁰ (2002) WLR 1271.

pleaded otherwise the party seeking to rely on it will be disentitled from availing itself of its benefit¹⁴¹.

Charges of fraud, illegality of contract, statutory immunity, lashes, acquiescence and undue influence, written agreements all have to be specifically pleaded. A careful reading of the decision of the Buea Court of Appeal in *Pierre Tchaque v Paul Sinju*¹⁴² will establish the point being made here. It is perhaps necessary to conclude that a comprehensive pleading may be criticized for its prolixity but remains ultimately better than one that is so concise that leaves out the relevant facts that are crucial for the determination of a party's case as was clearly stated in the *Pierre Tchaque's* case.

¹⁴¹ J. A. Dada, *The law of Evidence in Nigeria* University of Calabar Press (2004): 107.

¹⁴² *Supra*.

Amendments

Counsel's knowledge of the case may change as time evolves. Besides, it is as well possible that counsel may in fact have made mistakes in drafting pleadings thereby leaving out significant facts which ought to be pleaded in the statement of claim or of defence as the case may be. These possibilities make it necessary that amendments be sought and granted during the course of the hearing and determination of cases in court.

Order 33 of Rule 1 of Cap 211 has liberally permitted amendments to be made to pleadings "at any time of the proceedings" in the high courts of the Anglophone regions of Cameroon. The court may under this provision "order any proceedings to be amended, whether the defect or error be that of the party applying or not." The overriding principle is that amendment would be made if it becomes imperative "for the purpose of determining in the existing suit the real questions or question in controversy between the parties"¹⁴³.

The rationale behind this rule lies in the fact that the duty of the court is to do justice by determining the rights of the parties and not to punish them for their mistakes or for those their counsel may have made.¹⁴⁴ That this provision seeks to prioritize the pursuit of justice is further evidenced by the fact that it indicates that amendments are also for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit.

The application for amendment must be accompanied with affidavit evidence showing that the error sought to be

¹⁴³ Order 33 rule 1 of Cap 211.

¹⁴⁴ Ibid.

corrected is genuine. Order 33 is different from the rules governing amendment in the Nigerian States outside the old Eastern region as well as the rules now applying in England. Decisions from these regions suggesting restrictions on the courts powers of amendment are inapplicable in Cameroon.

The general rule that courts will allow amendments to be made at any stage of the proceedings before judgment was affirmed in *SCB Credit Lyonnais v Sanda Umaru & Anor*.¹⁴⁵ Here the Buea court of appeal reiterated the fact that amendments will be granted in the interest of justice. Once a party seeks an amendment which he considers necessary for his case it will be inconceivable that a court will deny it on the basis of the clear provisions of Order 33 and the case under reference.

Although the case dealt with the possibility of amendment in the court of Appeal, the principle applies with equal force in the High Court as well. Amendments can be made at the close of proceedings after both parties have closed their cases as was the case in *Dr. Dina v West African Drug Company Ltd*.¹⁴⁶ However, in situations such as this the court will exercise its usual discretion and award cost against the party who has been granted the order to amend. It was in the *Dr. Dina* case herein noted generally that an amendment may be allowed even after close of addresses:

a) where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of the case as in issue between the parties.

¹⁴⁵ *African Continental Bank Ltd v Ewarami P O* (1978) ALL NLR 114.

¹⁴⁶ *Suit No CASWP/45/2008/1m/2009* Unreported. (1971) All NLR 496.

b) Where the fact the subject matter of the amendment has been referred to by counsel in opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence that it is a matter in controversy and the amendment will enable the court to arrive at the view, if it thinks fit, that what is pleaded is correct interpretation of the facts.

An amendment which will however cause obvious injustice to the other party will not be permitted. Although it is difficult to conceive situations when this may occur in a real life case, an amendment which will introduce a cause of action which had become statute barred will not be granted. *Sime*¹⁴⁷ has captured the rationale behind this principle rather graphically when the author argued that “an amendment to add or substitute a new party or a new cause of action is deemed to be a separate action to have been commenced on the same date as the original action¹⁴⁸. Consequently, if the action was commenced within the relevant limitation period, and an amendment is allowed adding a party or cause of action after the expiry of the limitation period, the defendant will be deprived of the limitation defence, and will usually suffer injustice not compensable by an order for costs. The usual rule, therefore, is that such amendments are not permitted¹⁴⁹.

It is plain that an amendment can be done even on appeal. In *Gabuin Stephen v The People of Cameroon*¹⁵⁰ 161 the court of appeal allowed an amendment of the process in the court of appeal by the substitution of the second respondent. The court also ordered the records to be amended to reflect the change.

¹⁴⁷ *Sine op cit* at 150

¹⁴⁸ (LA 1980, Sec5on 35(1) and 2)

¹⁴⁹ (LA 1980, Sec5on 35(3))

¹⁵⁰ CASWR/10c/08/1m/2010

Preliminary Applications

There are invariably a variety of incidental issues which may arise in the course of the determination of a civil case. These vary in importance and complexity with some potentially capable of putting an end to the entire substantive suit itself. This is why Order 34 Rule 1 of Cap 211 permits the parties in a high court suit to bring interlocutory applications “by motion at any stage of a cause or matter.” A major preliminary application in civil actions which may be brought under this provision in the high court is that which usually seeks to dismiss the action for any of a number of reasons. The standard and perhaps most controversial one is that which is brought pursuant to the provision of Order 28 Rules 1&2 of the Supreme Court Rules to dismiss the suit for not disclosing a cause of action.

Although this application may be brought in respect of all civil actions however commenced on the basis of the fact that a cause or matter means any civil proceedings commenced by writ or in such other manner as may be prescribed¹⁵¹, it obviously cannot be adopted in labour actions. Labour actions are *sui generis* in the context of Cameroon because they are initiated and determined under the labour code which establishes an entirely distinct regime of procedure.

Clearly, since labour actions are neither initiated by writs/petition/motions nor have pleadings, they are not amenable to a resolution by a preliminary application which is based exclusively on an evaluation of the pleadings. To do otherwise will in fact vitiate the express provisions of section 39 of the labour code which vest a labour court with the

¹⁵¹ See *Udoh V O.H.M.B* (1993) 7NWLR pg. 304, 137

responsibility to investigate the reasons for a worker's dismissal.

Ideally, a preliminary application to dismiss a substantive civil action of this specie is initiated by a preliminary objection (PO) and not by motion on notice. It has to be particularly stressed that all Order 28 applications proceed on the basis that the allegations in the application for writ of summons/statement of claim is true and provable. The same assumption applies to the facts contained in an affidavit or petition where the substantive action sought to be dismissed was initiated by motion or petition as the case may be.

Admittedly, the general practice is that parties usually give notice in their statement of defence of the intention to raise an identified point or points of law at the trial. This in itself does not dispense with the requirement that a notice of preliminary objection be filed and argued at the High Court. The situation will be different in the court of appeal where such notice has been given and argued in the brief of counsel. In such a situation, the court can legitimately deal with a notice contained in the brief of argument of counsel.

Order 28 rules 1&2 have been reproduced here for the purpose of a better appreciation of this province of the law. It states thus:

“1 .Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the plain- tiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him.

2. For the purpose of such application, the defendant shall be taken as admitting the truth of the plaintiff's allegations and no evidence respecting matters of fact, and no discussions of questions of fact shall be allowed.”

Quite apart from the unambiguous language of rule 1, what does rule 2 mean by asserting that “the defendant shall be taken as admitting the truth of the plaintiff’s allegation” to the extent that “no evidence respecting matters of facts...shall be allowed?”

We must invariably turn to the Nigerian Supreme Court the highest court from whence the rules emanate for guidance. In *Alhaji Katagum & Others v M.E.K Roberts*¹⁵² Bret CJ of the Supreme Court held while interpreting this provision of the rules of court that:

“On a motion under Order 28 of the High Court Civil Procedure Rules, the court must assume the facts pleaded in the statement of claim are correct.”

Suffice it to say that this authoritative and compelling interpretation of Order 28 was followed by the Court of Appeal Buea in *Port Autonome de Douala v Jose Martinez Bonmati*¹⁵³. Here, while responding to arguments by counsel for the appellant on the effect of an Order 28 preliminary application, A N Njie JCA held that the adoption of an Order 28 procedure must proceed on the basis that the defendant has admitted “the allegations of facts contained in the statement of claim if the issue is taken before the trial”.

From the above, it is clear that what is material in a PO brought under Order 28 as indeed all POs are the facts in the pleadings and certainly not the affidavit evidence in support or opposition to the application as it is often erroneously assumed. The determination of an application to dismiss a substantive action under Order 28 must proceed on the assumption that the defendant has admitted to the truth of all the averment in the plaintiff’s pleadings. It cannot in fact be otherwise because rule 2 of Order twenty eight states clearly that “for the purpose of such application, the defendant shall

¹⁵² 1967 All NLR 137.

¹⁵³ Suit No /13/2006 unreported decision of the Court of Appeal Buea.

be taken as admitting the truth of the plaintiff's allegations and no evidence respecting matters of fact, and no discussions of questions of fact shall be allowed."

An Order 28 application it should be noted is not a magic wand to use for all purposes. Forbang J of the Buea high court had thus held in *Suh Felix Che v Kobua Deborah Nchang*¹⁵⁴ that it is inappropriate to seek the dismissal of a petition under Order 28 on grounds that the matter is *res judicata*. The respondent applicant had argued that a petition filed by the petitioner was *res judicata* since another judge of the same high court had dismissed a similar petition because an appeal by the same parties was pending in the Court of Appeal Bamenda.

In response to counsel's argument that *res judicata* is a special defence not amenable for an Order 28 application, the judge noted that "it is unthinkable to raise the special defence of *res judicata* like in the instant case". Citing the Supreme Court decision in *Kwenyi Lucas Ngoye v Geodis Overseas Carem & others*¹⁵⁵ the erudite judge held that for *res judicata* to be raised there must be privity of the parties and the subject matter for adjudication implying thereby that this could not be dealt with by an Order 28 application which does not deal with facts.

Although not cited by the learned judge, the decision of Forbang J is further supported by the decision of the Buea Court of Appeal in *William Monangai v Tantoh Felix Ngang*.¹⁵⁶ Here Fonkwe JCA insisted that *res judicata* presupposes that there has been a final judgment or decree on the merit. The court of appeal insisted in this judgment that it is only when issues are adjudicated on the merits that the parties involved are prevented from re-litigating them. Clearly a decision that a petition cannot be heard because an appeal on it is pending in the court of appeal cannot debar the hearing of a petition of

¹⁵⁴ Suit No HCF/021/MC/2011 Unreported.

¹⁵⁵ Judgment no 36/s of 28th June 2007.

¹⁵⁶ Suit No CASWP/46/99.

the marriage after the court appeal had ruled that the marriage has not been dissolved.

It has also been interestingly held obiter that the preliminary defence of *lis alibi pendens* cannot be brought under an Order 28 application as well. Relying rightly in our opinion in *Oversea Union Insurance Ltd v New Hampshire Insurance Co*¹⁵⁷ the Forbang J held that:

“The proper practice therefore is for the preliminary defence of *lis alibi pendens* to be brought by mere application and not under order 28 r1 of the SCCPR Cap 211.....The proper attitude of the courts when the preliminary defence of *lis alibi pendens* is raised is to stay proceedings until the jurisdiction of the first court is determined.”

Clearly, unlike with Order 28 where a successful application will result in the dismissal of the suit as was stated by the Court Appeal Buea in *SYNES v Dr Dorothy Njeuma*¹⁵⁸, even where *lis alibi pendens* is sustained the proper approach by the court later seized is to decline jurisdiction in favour of the court first seized.

Objections on jurisdiction and *locus standi* are also quite clearly raised by way of notice of objection. It is however worth pointing out that it is excellent practice to raise such objections in *limine litis* or at the earliest opportunity as was stated by the Court of Appeal¹⁵⁹. Generally, the defendant who knows of an irregularity in the plaintiff's case (as against a major defect) but takes any step in the action is deemed to waive the right to object about the irregularity afterwards. This principle was stated in *J S Sonugu & Others v Chief Kehinde*

¹⁵⁷ (1992) QB 434

¹⁵⁸ *Supra*.

¹⁵⁹ (2005) 2CCLR Pt 11 99

Anaden¹⁶⁰ where it was held that it is not right for the defence to take advantage of an irregularity he had himself accepted by taking various steps after becoming aware of it.

The objection by the defence in this case was dismissed by the Nigerian Supreme Court because after being served with the writ which was defective, the defendant applied for pleadings and filed a statement of defence. The court was compelled to dismiss the objection as it did since the matter was made worse because four adjournments were taken and the matter fixed for hearing before the objection was taken.

Applying For Injunctive Orders

Although injunctions are technically speaking in the domain of the substantive principles of equity, their application and grant often raise considerable and interesting procedural issues. Before dealing with these issues which are off-course the object of this book, it would be necessary to define injunctions.

An injunction is a writ or in more popular legal parlance order of court by which a party in an action is commanded not to do or cease from doing some act not amounting to a crime.¹⁶¹ Although historically injunctions as equitable reliefs were only issued by the court of chancery, all courts in Cameroon have the undoubted jurisdiction to grant injunctions where appropriate. The definition of injunctions as indicated particularly as excluding power to restrain acts amounting to crimes is significant. Firstly, criminal actions do not come within the competence of the courts when exercising their civil jurisdiction. Secondly, injunction will not lie against someone who is not a party in the action as to do so will be a violation of the latter's constitutional right of fair hearing.

¹⁶⁰ (1967) ALL NLR 98.

¹⁶¹ J B Soundres Mozley & Whiteley's Law Dic5onay London (1977): 171.

Procedure for applying for injunction

How may an injunction be applied for? There can be no straightforward answer to this question as the procedure to be followed in applying for an injunction will invariably depend on the nature of the injunctive relief being sought. This being the case, it is imperative to ascertain from a purely adjectival point of view the different types of injunctions available. This is absolutely necessary since there is so much confusion surrounding the use of the expressions “ex parte” “interim” and “interlocutory” with regards to injunctions in the briefs as well as the ordinary discourse of lawyers.

Nnaemeka Agu JSC had in fact stated in *N.A.B Kotoye v Central Bank of Nigeria and 7 others*¹⁶² that this confusion permeates even judicial decisions. He cited the regrettable use of “interlocutory” and “interim” injunctions interchangeably by the courts to buttress his point. The misuse of these terms according to the learned justice often leads to the adoption of wrong procedure in applications for injunctive reliefs. This explains why the Supreme Court had in the decision under reference clarified the situation by holding that there are procedurally speaking two types of injunctions. These were identified as *ex parte* injunctions and injunctions *inter parte* or on notice.

The difference between the two the court noted is exclusively a matter of the procedural function of “the manner in which the application is brought and procured”. An application may come to court by way of an *ex parte* motion for injunction under Order 34 rule 7(1) of the Supreme Court Rules Cap 211. This provision empowers a party “on a motion *ex parte*” to “apply for either an immediate absolute order of the court, in the terms of the motion paper ... or an order on the other party to appear on a certain day and show cause why an order should not be made in terms of the motion paper.”

¹⁶² (1989) All NLR 76.

The competence to grant applications of this nature is also generally derived from the express provision of section 18(1) of the judicial organization¹⁶³ Law of 2006 which categorically gives the courts the competence to hear applications. However, in spite of the above provisions, it has to be stressed that the court may only exercise its discretionary power in favour of granting injunctions on an *ex parte* application when the prayer is for an interim order of injunction. Certainly, exceptionally injunctions can be made without notice to the adverse party usually for a period of not more than a few days, or until the respondent can be put on notice. *Ex parte* applications of this nature are made on the sole condition that delay to be caused by proceeding in the ordinary way of putting the other party on notice would cause an irreparable mischief or injustice.

Urgency is the necessary fulcrum on which an *ex parte* application for injunction rest. Besides, the urgency must be real and not one created as a result of the applicant's own inaction. It clearly cannot be otherwise in the context of Cameroon where the preambular provisions of the constitution as amended in 2008 guarantees to all a fair hearing in the course of the determination of their civil and criminal causes. These preambular provisions which have by the provisions of article 65 of the same constitution become part of the country's constitutional law, places an inflexible duty on all courts in the country to ensure that no serious decision is taken against a party in an action without adequately hearing his own side of the case.

An *ex-parte* application for an interlocutory injunction which has the capacity or potential of either lasting for long or until the determination of the suit is irredeemably bad in the Anglophone regions of Cameroon for violating the preambular constitutional provision as read alongside article 65 dealing with the fundamental rights of fair hearings. It was following a

¹⁶³ Ibid

similar constitutional provision of the Nigerian constitution held in the Kotoye case that a court acts illegally where it grants any order on an ex-parte application that can last until the determination of the case. The Supreme Court justified this rather strong statement on the grounds that fair hearing is synonymous with fair trial and that dealing with disputes including applications for injunction by way of ex-parte applications violates both of these elementary principles of civilized judicial practice the world over.

The fair hearing and fair trial concept enshrined in the preamble of the Constitution 2008 has been synthesized as including the following:

(a) The court shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial.

(b) That the court or tribunal shall give equal treatment, opportunity and consideration to all concerned.

Respect of the rules of fair hearing was in *Balami v Bwala*¹⁶⁴ regarded as one fundamental way of enforcing the constitution. It would be impossible for Cameroon to lay claim to the existence of a culture of constitutionalism where the courts fail to adhere scrupulously to the respect of the rights of fair hearing. Hearing and determining an application ex-parte where the prayer sought is either permanent or torches on a significant issue in dispute between the parties is without an iota of doubt unconstitutional.

Good practice dictates that a proper ex-parte order for injunction shall be brought by the party filing two motions simultaneously praying for the same order the first ex-parte and the second on notice. The ex-parte one is taken and heard pending the hearing and determination of the motion on notice. It may however also be made in the course of the argument of an application on notice for injunction as was

¹⁶⁴ (1993) 1 NWLR Pt 267 at 275.

correctly done by Forbang J in the high court of Buea in *Robert Akoko v Sirri*.¹⁶⁵ The latter procedure may only be resorted to where it is plain that the hearing of the application on notice will take time.

In *Robert Akoko v Sirri*¹⁶⁶ the applicant's car was impounded and kept at the police pending the conclusion of investigation of a dispute over the alleged incomplete payment for the transportation of the car from America to Cameroon. The applicant through counsel filed a preliminary application for an order releasing the car to him pending the determination of the substantive suit. Although there was affidavit evidence showing that the car was deteriorating in the police where it was parked, the respondent kept delaying the hearing of the motion through multiple adjournments. Based on these facts, counsel for the applicant sought and got an interim order releasing the car pending the determination of the motion on notice.

It was in *Kotoye v CBN*¹⁶⁷ categorically warned that “parties and their counsel ought not to be encouraged to file and argue a sole application ex-parte when asking for orders which can only be properly made on notice. The circumspect thing to do when a party brings an ex-parte application in respect of orders which look permanent in formulation is to order the applicant to put the other party on notice.

Interlocutory Injunction: Procedural Issues

An application for interlocutory injunction which potentially could last until the final resolution of the case rests on entirely different procedural considerations. These applications are as a matter of course brought by motion on notice supported by affidavit evidence. The courts in Anglophone Cameroon it is clear from a circumspect reading

¹⁶⁵ Supra.

¹⁶⁶ Ibid.

¹⁶⁷ Supra.

of Nana JCA's decision in the case of *Société' Camerounaise de Transformation Métallique (SCTM) & others v Nchanji Chifu Maurice*¹⁶⁸ has jurisdiction and competence under section 7 of the Southern Cameroon High Court Law 1955, section 18(1) (b) of Law No 2006 and Order 56 of the rules Cap 211 to hear and grant civil claims including injunctive orders.

It is however essential to observe that such orders are not granted as a matter of course. This is so since an injunction was in *Awah Nde Julia v John Tatsa*¹⁶⁹ held to be a very serious issue the breach of which exposes the violator to the possibility of imprisonment for contempt of court. The affidavit supporting the motion for grant must of necessity establish the basis for which the injunction is sought.

Besides, regardless of the merit of the claim to the entitlement to an injunction, the applicant must also provide an undertaking that he/she will pay damages to the respondent should it turn out that the injunction order was not justified. The undertaking has in fact been described as "the price which the person asking for an interlocutory injunction has to pay for it"¹⁷⁰. The undertaking is given in the affidavit of the applicant although it may in fact be contained in a statement annexed to the affidavit as an exhibit.

The court in dealing with preliminary applications is guided as always by the sole interest of justice. It is for this reason that the courts in Anglophone Cameroon have consistently cautioned against seeking in a preliminary application a remedy similar to that in the substantive action. It was thus categorically held in *Cameroon Lonester Fishing Company v Caliguiseppe Trading under the Name and style Italian Liberation*¹⁷¹ that "the court will not grant a remedy in an

¹⁶⁸ (2012) 1 CCLR 77.

¹⁶⁹ (2010) CCLR 37

¹⁷⁰ *Kotoye v CBN* (Supra) at p105

¹⁷¹(2001) 2CCLR 127.

interlocutory application when the remedy sought is essentially the same as that prayed for in the substantive suit between the parties”

B.B. Bawak JCA as he then was in the case under reference noted that doing so will be pre-empting the hearing of the substantive suit. Indeed, a court that grants an order of injunction in a preliminary action which is similar in substance to the relief contained in the main action disqualifies itself from hearing the main action because it will in essence be sitting on appeal on an issue it had already decided!

The Buea Court of Appeal had no difficulty in concluding that the Limbe magistrate court adopted a wrong procedure when it ordered on a preliminary application that the vessel had become the property of the applicant. Bawak JCA as he then was put the procedural issue rather graphically thus:

“The court will not grant a remedy in an interlocutory application when the remedy sought is essentially the same as that prayed for in the substantive suit between the parties..... In delivering its ruling, which ruling is now on appeal, the trial court granted the application. In so doing, it pre-empted the hearing of the substantive suit.”

Although this order which completely compromised the prayer in the substantive suit in which the plaintiff/respondent was claiming to own the vessel emanates from the magistrate court, the decision of the court of appeal describing it as procedurally unsound will apply with equal force to preliminary applications in high courts in the Anglophone regions of Cameroon if orders from such applications prejudice the substantive action.

Principles for grant of injunctions

It is necessary to analyze the principles for the grant of injunctions because the subject has been submerged in some confusion for a while. The equitable remedy of injunction is under Order 33 rule 1 of Cap 211 and the inherent jurisdiction

of the court in the complete discretion of the judge. Admittedly, as a rule injunctions are only granted when after a review of the affidavit evidence of the applicant and respondent the court comes to the conclusion that it is just and convenient to do so. Yet, in spite this, there are clear principles that the judge must take account of before granting the relief. Foremost amongst these principles which must first be demonstrated by affidavit evidence is the fact that the applicant has a pre-existing cause of action. This principle is sometimes described as the presence of a *prima facie* case.

The court must under this principle ascertain that the applicant for injunction has a right which has been threatened by the activity sought to be restrained. Lord Diplock captured this principle in the *Siskina Case* when the judge noted that an injunction is dependent upon a pre-existing cause of action against the defendant. This most certainly arises out of an invasion, or threat to the legal or equitable right of a defendant who is under the jurisdiction of the court. Clearly therefore, where the applicant cannot establish a right in his favour the court would not grant him an injunction.

The *locus classicus* in this province of the law is the *American Cyanamid & Co v Ethicon Ltd*¹⁷²¹⁸⁴ which was also decided by Lord Diplock. This case formed the basis for the decision in the celebrated Nigerian case of *Kotoye v CBN*. Both cases established that injunctions¹⁸⁵ are based on the following considerations:

Serious question to be tried

Sime¹⁷³ has rightly pointed out that before the *American Cyanamid Co. v Ethicon Ltd*¹⁷⁴, the courts would only grant an interim injunction if the applicant could establish a *prima facie* case on the merits. The author notes that this meant that the

¹⁷² (1975) AC 396

¹⁷³ (1989) All NLR 76

¹⁷⁴ *Supra*.

courts needed to consider the respective merits of the parties' cases in some detail. This encouraged the filing of detailed written affidavit evidence supported by voluminous exhibits, and resulted in lengthy interim hearings.

The position has now changed following Lord Diplock's view that "it is no part of the courts' functions at this stage of the litigation to try to resolve conflicts of evidence on affidavits which the claim of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration". Now, the court only needs to be satisfied that there is a serious question to be tried on the merits. It is plain from a circumspect reading of the *CBN v Kotoye* case that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality.

Adequacy of damages to the applicant

If there is a serious question to be tried on the merits of the substantive claim, the court should then consider whether the applicant will be adequately compensated by an award of damages at the trial. This test was beautifully captured in *American Cyanamid Co. v Ethicon Ltd.* Here it was said that "if damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no (interim) injunction should normally be granted. Damages will often be an adequate remedy for the claimant in a variety of claims particularly those for breach of contracts. This situation is different according to Sime where:

(a) The defendant is unlikely to be able to pay the sum likely to be awarded at trial.

(b) The wrong is irreplaceable, e.g., loss of the right to vote.

(c) The damage is non-pecuniary, e.g., libel, nuisance, trade secrets.

(d) There is no available market.

(e) Damages would be difficult to assess. Examples are loss of goodwill (*Foseco International Ltd v Fordath*¹⁷⁵ disruption of business (*Evans Marshall and Co. Ltd v Bertola SA*¹⁷⁶ and where the defendant's conduct has the effect of killing off a business before it is established (*Mitchelstown Co-operative Society Ltd v Société des Produits Nestlé SA*¹⁷⁷).

In all situations, if damages would be an adequate remedy for the threatened breach sought to be restrained the injunction must be refused.

Balance of convenience

In practice, most injunction cases are determined on the basis of where the balance of convenience lies. In *American Cyanamid Co. v Ethicon Ltd*¹⁷⁸ Lord Diplock said that it would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

In another case in *Cayne v Global Natural Resources plc*¹⁷⁹, the court instead insisted that it is not mere convenience that needs to be weighed, but the risk of granting an injunction to one side or the other.

Status quo

In *American Cyanamid Co. v Ethicon Ltd*¹⁸⁰ Lord Diplock said that in considering the balance of convenience "where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve

¹⁷⁵ (1975) FSR 507

¹⁷⁶ (1973) 1 WLR 349)

¹⁷⁷ (1989) FSR 345

¹⁷⁸ (*supra*)

¹⁷⁹ (1984) 1 All ER 225

¹⁸⁰ *ibid*

the status quo.” The phrase “to preserve the status quo” has in *Udo v I .T .C .M. E .C*¹⁸¹ been construed as that peaceful state or status before the litigation. Where however this had been disturbed before the filing of the action the status quo is not the unlawfully created one immediately preceding the suit, but, the original peaceable or peaceful one before it was apparently unlawfully altered.

However, regardless of what has been said so far, it must in the final analysis be stressed that no court will grant an injunction to re- strain an act that has already be done. The court of appeal stated this solid principle in *Udo v I .T .C .M. E .C*¹⁸². In the trial court, the respondent was granted an injunction restraining the appellant from continuing with possession of land which had been in appellant’s possession years before the respondent claimed to have acquired his own interest on the land. On appeal the court of appeal reversed the injunction “because what is sought to be prevented had happened.” The court justified its reversal on the grounds that “an interlocutory injunction is not a remedy for an act which has already been carried out” and would not be granted where the act complained of is merely irregular.

¹⁸¹ ((2010) ALL FWLR 93.

¹⁸² (2010) ALL FWLR 93.

Judgments

The primary role of the courts is to do justice to both the contending parties and the society at large. After all the evidence is taken and addresses done, it is critically important that the judgment should inspire societal confidence. The best test of this is where both litigants and the ordinary bystander go away feeling that justice has been done and not otherwise. The quality of the judgment is naturally the exclusive basis for determining whether justice has been rendered the parties in a specific case or not. This being the case, the judge both trial and appellate must be scrupulous and conscientious in writing his judgment. Nothing should be left to chance.

By section 37(2) of the Constitution 1996, the judge is obliged to be guided only by his conscience in deciding a matter before him. Admittedly, the country operates a dictatorial executive system that uses the ministry of justice to swam the courts, an honest and God fearing judge should on the basis of section 37(2) of the Constitution perfectly do the right thing and deliver a just judgment in spite of the pressures that sometimes come from irresponsible government officials and politicians who believe that the courts should be at the beck and call of the executive and the rich.

It is in this light that one must commend the decision of Justice Bea Abednego Kalla in *Dr Luma & others v The People*¹⁸³. This indefatigable judge had in the judgment in this case dealt with the bail of the accused person as a constitutional issue raising important questions about government's adherence to its obligation under the country's

¹⁸³ (2002) 1 CCLR 6.

constitution and international treaties that the country has ratified. In spite of pressures from state officials, he did the right thing and granted the accused persons bail in a decision which has been applauded as representing the Cameroon judiciary of the future.

A good judgment must be comprehensive addressing the salient evidence adduced and important points canvassed in the addresses if any. The former West Cameroon Court of Appeal, Buea had in *Martinez Joseph v Nkweata Metal Enterprise*¹⁸⁴ expressed its dissatisfaction with a judgment which consisted of only four sentences thus:

“I find that the plaintiff’s evidence is unsatisfactory where there is a difference between the plaintiff and the defendant’s evidence. I prefer evidence of evidence of defendant. The plaintiff has put up a badly inflated case and I find him to be dishonest. There will be judgment for the defendant and the plaintiff is to pay 5000 frs to the defendant”

After deprecating this decision for being of very poor quality, O Brien Quinn JCA stressed that a judgment properly so called must be in writing containing “the point or points for determination, the decision thereon and the reason for the decision”. To say that plaintiff’s evidence was unsatisfactory “where there is a difference between the plaintiff and the defendant’s evidence” without specifically indicating why this is so can only be described as truly unfortunate. This is so for the obvious reason that a good judgment must be well motivated.

Courts Bound by the case brought by the parties

It is in spite of what have been stated above plain that under no circumstances may a court in a judgment pronounce

¹⁸⁴ (1968) U. Y. L .R 50.

on issues not before the court. The courts are under the rules limited to determining only on the issues which have been properly raised before them by the parties. Courts are certainly neither Father Christmas nor are they involved in inquisitions. Mbuagbaw CJ had for this reason held in *Sonel v Manfred Noto*¹⁸⁵ that “the duty of a court is limited, strictly limited and confined to trying the issue arising from the pleadings.” A trial court according to the learned chief judge “is not to go on a wild goose chase” or “embark on an academic exercise in which all sorts of questions are discussed at will without reference to the pleadings, the issues and to the admissible evidence.”¹⁸⁶ It is perverse for a court to determine an issue not brought before it.

The judge must not descend into the arena of the dispute to examine witnesses under the pretext of “questions by the court” and or make comments during addresses since this will invariably assist one of the parties in the trial thereby undermining his impartiality. A judge, it was held in *Godlove Shu v Becky Mojoko*¹⁸⁷ should play a passive and inactive role in the course of the trial before him/her. Mbah Acha JCA in the case under reference justified her wise council in this decision on the basis that “we operate the adversary system, not the inquisitorial system” noting that “it is in accord with judicial comportment and attitude that interruption and questioning from the bench be cut down to the barest minimum if it cannot be avoided altogether.” It follows from this articulate rendition that a judgment that was influenced by the undue interference of the presiding judge could be reversed on appeal.

A closely related procedural principle is that a court should not in its decision grant prayers not specifically sought in the pleadings of the parties. This position which is fundamental is

¹⁸⁵ (2000) 1 CCLR 13.

¹⁸⁶ Ibid.

¹⁸⁷ (2010) 1 CCLR 118.

connected to the one so ably articulated by Mbuagbaw CJ in the Sonel case above. It proceeds on the view that a claimant is bound by his pleadings and can only get what he has expressly claimed therein. Bawak JCA as he then was had also held in *Fon Doh Gwayim & Others v Peter Njontor Ngufor*¹⁸⁸ that it is elementary that a court cannot award what is not claimed. This principle was rationalized on the incontestable argument that “to do so will amount to acting without jurisdiction.” Bawak’s decision in the *Fon Doh Gwayim* case is in tandem with the ratio by the Nigerian Supreme Court in *Ajayi Babatunde v Texaco Nig Ltd.*¹⁸⁹

Furthermore, it must be appreciated that to give a party what has not been claimed breaches the golden rule of practice requiring that the opponent is not taken by surprise. A party against whom a decision on an unpleaded claim is given can with certainty reverse it on appeal since there could have been no way s/he would prepare to adequately answer such a claim. This issue also raises the constitutional question of fair trial as contained in the preamble of the 1996 Constitution of Cameroon as amended. A party who discovers that a compelling issue or claim is not pleaded should apply for leave to amend the suit to incorporate the issue or claim since this can be done any time before judgment.

Two significant questions also come to mind about judgments viz: What if the judgment has been induced by fraud and can a court review its own judgment? These interconnected questions are dealt with here for purposes of completeness. It, in fact, does sometimes happen that in spite of the best efforts of the judge and counsel an unscrupulous party can fraudulently misled the court into giving judgment in his favour. Where this happens, it is clear that such a judgment could be set aside *ex debito justicie* on the application of the

¹⁸⁸(2005) 1 CCLR 20.

¹⁸⁹ (1987) All N L R 471.

innocent party under the broad principle encapsulated in *Bar Henry Ngalle Monono*¹⁹⁰ & *Anor v Sonel*. A judgment obtained by fraud is in fact non-existent in the face of the law since it was in the present case held by Asuagbor CJ that such a judgment is “inoperative as *res judicata*.” The answer to the second question is equally straightforward. Judgments must necessarily be final with the court that delivered them becoming *functus officio* after the judgment has been read. It was thus held in *The Procureur General, North West Province v The Cameroon Bar Association Represented by the Cameroon Bar Council & Anor*^{203a} that:

“As a general rule, except by way of appeal, no court, judge or magistrate has the power to rehear, review, alter or vary any judgment or order after it has been drawn up, entered or delivered either on an application made in the original matter or in a fresh action brought to review such a judgment.”

By so holding, the court of appeal dismissed an application by the PG North West Province as it then was to nullify the court’s earlier decision swearing in the 2nd respondent as an advocate on a preliminary objection by the respondent. The PG’s strong argument that the 2nd respondent was sworn as an advocate in error was held to be of no moment. The above decision is equally significant for establishing the principle that since the advocate is sworn in Cameroon by a judgment of the court of appeal, a lower court cannot declare an advocate incompetent to appear before it for any reason which occur after the advocate had been sworn without a full and complete

¹⁹⁰ (2005) 1 CCLR 1

^{203a} *Supra*.

disciplinary sanction by the Bar Council¹⁹¹ which has been affirmed by the court of appeal that swore the advocate in.

The principle that judgments are final is however subject to a variety of exceptions which were equally articulated in the above decision. The court exhaustively identified the exceptions under which it would review its own decision as follows:

- Where a statute alters the law retrospectively and gives ex-press powers to the court to rescind or grant relief against previous orders or judgments delivered before the alteration as was shown in *Moorgate Estates Ltd v Tower*¹⁹². It would in fact be difficult to find this type of examples in countries with a strong constitutional culture because such ad hominum statutes may be struck down as unconstitutional.

- Where there has been some procedural irregularity in the proceedings leading up to a judgment or order which is so serious that the judgment or order in question ought to be treated as a nullity, then the court will set aside its own judgment. However there is no decisive test for ascertaining which judgment is voidable but one test which may be applied is whether the irregularity has caused a failure of natural justice. See the case of *Marsh vs Marsh* (1945) AC 271. The Learned Procurer General did not raise this point in his reply to the objection.

- Where a judgment in default of appearance or defence has been delivered before the proper time or there has been no sufficient service or the judgment has been entered for a greater amount than it is or there has been a breach of good faith, it will be set aside *ex debito iustitiae* apart from any

¹⁹¹ (2000) 1 CCLR 106.

¹⁹² (1942) 2 All E R 522

consideration as to whether there exist a good defence on the merits. The Plaintiff is usually ordered to pay costs occasioned by the judgment or order.

- Fifthly, the court has the power to set aside judgments obtained by fraud. In that case, the fraud must relate to matters which *prima facie* would be a reason for setting aside the judgment if the fraud is proved.

- Sixthly the Court has the power to rescind a judgment on discovery of new material evidence.

- Seventhly, the Court has the power to rescind a judgment where it is obvious that the Court was misled into giving a judgment under the mistaken belief that the parties consented to it. Compromise judgments would be set aside on the grounds that the agreement was illegal, against public policy, obtained by fraud, or misrepresentation or non disclosure of a material fact which was there or by duress or was concluded under a mutual mistake of fact or without authority. This exception does not apply to the case under examination.

- Eighthly the Court has an inherent power to vary its decision to carry out its own meaning in cases where the language used is doubtful, ambiguous and does not express precisely the decision taken by the Court. See the case of *ORUKUMKPOR vs ITEBU* (1955) WACA 39.

- The ninth exception is that the Court has an inherent power to set aside its own judgment where the said judgment is found to be ruthless see the case of *OKOLI OJIAKO AND OTHERS vs ONWUMA OGUEZE AND OTHERS* (1962) ALL N.L.R.58.

In dealing with the issue of the discovery of new evidence, it must be shown that such evidence is material in the sense that it would be a reason for setting aside the judgment if it were established by proof that the discovery is new and that it could not with reasonable diligence have been discovered before. After asking whether in the instant case the discovery of the fact that the second respondent had no proficiency certificate is something which couldn't with reasonable diligence have been possible at the time the Learned Procureur General moved the Court and second Respondent was sworn in, the court easily held that the Procureur General would have discovered at the time the second respondent submitted his file to the Procureur General that he had no proficiency certificate. Based on this, the court held that the fresh or new evidence that the Learned Procureur General wanted to bring to the Court in the matter did not meet the requirements of the law because the evidence was not as fresh as the law expects it to be because the evidence had always been there.

Non Suit

There are certain actions that after the entire proceedings (evidence and addresses) had been done, it is obvious to the trial judge that neither party is entitled to judgment. Where this is the case, it will be an injustice to dismiss the case as this will hand victory to an undeserving defendant. On the contrary, it was in *E K Lotin v Clara Orock*¹⁹³ held that where neither party in an action is entitled to judgment, the court has to grant a non-suit instead of a dismissal. Arrey C J in the case under reference ordered a non-suit because after weighing all the facts and circumstances, the scale of justice had tilted on the side of a non-suit rather than a dismissal.

Although the learned CJ did not itemize the circumstances when the non-suit should be entered, it is certain that the issue

¹⁹³ Suit No CASP/32/97

will depend on the peculiar facts of each case. In the case under reference, the learned trial judge had non-suited the appellant after noting that the respondent was in breach of an implied term of the lease to return the rented house in a tenantable condition. On appeal, it was argued that the order was wrong because the appellant's house had been burnt while in the possession of the respondent as tenant. Yet the court of appeal affirmed the judgment insisting that the non-suit was just since the destruction was done by a stranger who killed the respondent's children during a deliberate arson attack.

Appeals

A decision of a court of record can be challenged on appeal by either party to the action in the same way as every other judgment. It cannot be otherwise as Asuagbor CJ had in *Dr Halle Ekane v Halle Nee Nzame Cecillia Elo*¹⁹⁴ categorically affirmed that access to the court of appeal is cardinal and foundational in Cameroon as it is in all democratic countries. The learned CJ in this case after holding that appeals exist as of right in Cameroon also reaffirmed “once more that conditions of appeal are not intended to frustrate the applicants in the exercise of their constitutional right of appeal.” Appeals are according to the ruling in *D Halle Ekane*’s case a constitutional right so fundamental that the judicial process will be meaningless without it.

What is an appeal for our purpose? It is imperative to ask and answer this question for the purpose of dealing with the issue comprehensively. An appeal has been defined essentially as “a complaint to a superior court of an injustice done by an inferior one”.¹⁹⁵

Appeals are against decisions of courts with decisions used generically to include judgments, orders, rulings, acts or recommendations.

Generally, based on the above, an appeal must involve a specific complaint or complaints against an issue of law or fact raised and determined by the lower court. As a rule, a court of appeal will not entertain without leave of court an appeal on an issue not heard and determined by the trial court. This point

¹⁹⁴ Suit No CASWR/5m/C/2010 Unreported

¹⁹⁵ J Saunders Mozley & Whiteley Law Dictionary Butterworths 1977: 22.

was confirmed in *Pastor Angus Egbouho & Others v Emmanuel Adindu & Others*¹⁹⁶ where Nana JCA castigated the appellants for attempting to argue issues in two grounds of appeal which were not raised at the trial of the main matter in the lower court.

The judge declined entertaining these grounds and dismissed them although the issues forming these grounds of appeal were canvassed in an interlocutory proceeding of the main matter. The situation would clearly have been decided differently by the court of appeal had the appellant applied and gotten leave to argue the issues not raised at the lower court. Usually, an appellate court will exercise the discretion to grant such an application particularly where the issue raised touches on a *recondite* point of law.

As have already been observed, a party who disagrees with the decision of a court has the right to appeal against same except where the decision is that of the Supreme Court from which no appeal lies. However, it must be stressed that appeals do not lie as of right in all situations under the legal system operating in the country. Clearly, there are instances where in spite of the fact that an injustice may be perceived to have been done yet the party concerned can only appeal with leave of court.¹⁹⁷

It is worth noting that procedurally speaking, where a party fails or decides not to appeal against any decision of a court of law, he is deemed to have accepted the decision. The corollary of this principle is the indisputable conclusion that a party is absolutely bound by a decision not appealed against no matter how outrageously wrong the decision might be. This is both *trite* law as well as the obvious dictate of civilized behaviour.

¹⁹⁶ Suit No CASWP/23/2008 Unreported.

¹⁹⁷ *Tomtec Nig Ltd v F.H.A* (2010) ALL FWLR 403.

Time for Filing Appeals & Extension of Time to Appeal

Part VI rule 31 of the Federal Supreme Court Rules 1961 set the time limit for the filing of appeals. Under it an appeal must be filed within three months from the date that the decision appealed against was delivered at the lower court. An appeal filed after the prescribed period is incompetent and would for this reason be dismissed. However, the appellate courts have the discretion to allow for extension of time to file an appeal out of time. This discretion which is invariably to be exercised judiciously must be based on an application brought by motion on notice. The conditions for the exercise of the discretion to extend time to appeal was articulated in *Domestic and Industrial Guards Enterprise v Yunji Amos*.¹⁹⁸ This was a motion on notice by which the applicants through counsel sought an order extending the time to appeal against the decision of the Court of First Instance Tiko in Suit N° TM/17/L/03-04 a copy of which was attached to the motion.

After holding that it is within the discretion of the court to grant the order for extension of time, Njie JCA stressed that an applicant for extension of time within which to appeal must fulfil two conditions in order to succeed. He stated that:

“Firstly such an applicant must in the supporting affidavit to his motion on notice give substantial reasons for the delay and secondly the proposed grounds of appeal must *prima facie* show good cause why the appeal should be heard. Those two conditions were extensively discussed in the case of *University of Lagos Vs. Olaniyan and others* 1985 1 SC 295.”

Since in the case under reference none of the paragraphs of the applicants’ affidavit contained any reason why the

¹⁹⁸ SUIT N0.CASWP/60m/L/2007

applicants were unable to appeal against the lower court's judgment which was delivered twenty months before they filed their motion the court refused to exercise the discretion in their favour. Furthermore, the applicant's case was made worse because they did not exhibit the required proposed grounds of appeal for the court to evaluate the quality of the proposed appeal. It was in the circumstances no surprise for the court of appeal to describe "the applicants' failure to give reasons why they could not appeal within time and their further failure to attach proposed grounds of appeal" as simply rendering "their motion incompetent and worth- less".

The applicant in *Joseph T Ngoni v Namondo Etongo*¹⁹⁹ was granted extension of time to appeal out of time by the same division of the court of appeal. The court exercised its discretion to extend time because the applicant attached the decision to be appealed against. This decision did not discuss the issue of the potential merit of the appeal and the fact that the applicant did not attached the proposed grounds of appeal. It is apparent that the court assumed that by not filling a counter affidavit the respondent was not opposed to the application for extension of time. This judgment technically means that the non-filing of the proposed ground of appeal may not be fatal in an application for extension of time to appeal.

An appellant who ignores a decision and fails to appeal within time only to rush to the Court of Appeal when served with execution processes risk having his application for extension of time easily dismissed. The applicant in *Tawi Godfred v National Financial Credit Bank Kumba*²⁰⁰ had stayed away from the trial process as well as failed to appeal against the decision of the trial court within time. His motion for extension of time was grounded on the fact that the

¹⁹⁹ Suit No CASWP/15m/C/2007.

²⁰⁰ SUIT N^o.CASWR/27m/C/2009

applicant was both incarcerated in the Buea Central Prison and ill during the hearing of the matter before the trial court.

In spite of this claims in the affidavit, Mba Acha JCA rather held that since counsel failed to prove the blanket assertion of incarceration and the poor health of the applicant which supposedly made him unable to appeal within time, the omission is fatal to the application because “we cannot tell if the incarceration, if any at all, was at the time of the hearing of the matter by the trial Court when applicant was absent therefrom”. Based on this, the judge found “no reason to grant this application which we discovered was filed one year after the trial Court’s judgment, and just because the bailiff notified the judgment on the applicant to pay the judgment debt within 8 days”.

When is an appeal filed in Cameroon? Order 7 rule 4(1) of the Federal Supreme Court Rules 1961 states that appeals are filed “when the notice of appeal has been filed in the registry of the lower court”. On the lodgement of the notice and grounds of appeal, the registry of the lower court serves the notice of appeal on all those affected by the appeal. Fonkwe JCA as he then has held in *Sonel v Manudao*²⁰¹ that after the conclusion of these conditions precedent including the payment of the filing fee, the lower court registry transmits the records to the registry of the Court of Appeal. He further held that the lower court registry becomes functus officio after the transfer with the result that “it can no longer receive any ground of appeal or any application on the matter.”

Place for filing appeals

The court of appeal has insisted that all appeals must be filed in the registry of the lower court which delivered the decision. In *Ndaka Gabriel V National Social Insurance*

²⁰¹ (2001) 2 CCLR 156

Fund²⁰² Njie JCA held quite correctly that the appellant further grounds of appeal filed at the registry of the court of appeal were incompetent. This procedure of filing appeals in the registry of the court that delivered the decision was considered so foundational that the fact that the ill-fated further ground of appeal was headed “In the High Court of Ndian Division, Holden in Mundemba” was ignored as irrelevant.

The Court of Appeal via Njie JCA emphasised the point that : “The principle of law which this court has reiterated on several occasions is that a party desirous to appeal against a judgment must lodge his notice and grounds of appeal in the registry of the trial Court. In Labour Suits Section 154(1) of our Labour Code ordains that such notice and grounds of appeal be filed within 15 days after the decision of the trial Court. Even in cases where a party indicates his intension to file further grounds of appeal, upon receipt of the record of proceedings, such additional grounds of appeal are filed in the registry of the trial Court.”

The only exception where appeals may be filed in the appellate court is the rear one by which an appeal could be filed with the leave of the court of appeal itself. To get such leave, appellant must file a motion on notice with affidavit evidence explaining why the appellant is unable to lodge the appeal in the relevant trial court.

Conditions of appeal

Order 7 rules 9 and 10 of the Federal Supreme Court Rules 1961 have set a mandatory requirement which must be fulfilled before an appeal against the lower court’s decision can be filled. Under these rules, a prospective appellant is required to

²⁰² Suit No CASWP/L9/2002 Unreported. See also Union Cameroun de Brasseries v Baiye Afue Joseph Suit No CWSP/L.17/ 2000. This is an unreported decision by the same court stating that under our “rules of procedure if a ground of appeal alleges an error or misdirection or error in law should be stated.”

deposit as prescribed by the lower court a sum of money to cover the estimated cost for the preparation of the record of proceedings. These rules also require the appellant to either deposit or give security by bond both for the due prosecution of the appeal as well as to cover any cost that may be awarded in the course of the appeal.

The conditions are in practice given after the filing of the notice of appeal. Regrettably, the very laudable practice in other jurisdictions where the prospective appellant and respondent are made to appear before the registrar of the lower court to settle records by agreeing on what should be in the records and the estimated cost for its preparation are not followed in the courts in Cameroon. It is hoped that this practice will be reinstituted in future and thereby reduce the multiple applications for the revision of the conditions of appeal and for re-constitution of the records with their attendant cost and delays.

The conditions of appeal which are set by the trial court ought to actually reflect what is required for the purpose of covering the production of the appeal. The court must exercise this discretion judiciously as it was stated in *Dr Halle*²⁰³ case discussed earlier in this chapter. Clearly, where the exercise of this discretion is unreasonably expensive and speculative to the extent that it circumscribes the prospective appellant's right of appeal, the appeal court will revise it. Such a revision will be done on an application supported by credible affidavit evidence that the deposit required is excessive.

Conditions of appeal must be fixed in accordance with what Order 7 prescribes. Any arbitrary condition not covered by Order 7 rules 9 and 10 is illegal with the effect that it will be disregarded by the court of appeal. It was in *Society National D' Electricité v Manfred M Noto*²⁰³ held by Moutchia JCA as he then was that "any condition of appeal imposed by a court

²⁰³ (2000) 1 CCLR 13.

which does not come within the purview of Order 7 rules 9 and 10 is not valid in law”. Based on this principle, the court of appeal discountenanced a condition of appeal set by the lower court that the appellant should connect the premises of the respondent within a stipulated time before appealing as incompetent.

Although one may sympathize with the lower court which was apparently trying to curb the characteristic absolutism of SONEL which uses its monopolistic power to intimidate and make life unbearable for many Cameroonians, the order was manifestly unlawful. A better approach would have been to order the corporation to pay the customer damages of a certain amount for each day SONEL failed to connect the electricity as ordered by the court. The court of appeal may allow an appellant who has failed to fulfil the conditions of appeal leave to do so on an application showing good and substantial reasons why the conditions were not satisfied within time. Asuagbor CJ held in *Chufor K Paul v Columbus N Nwaokenna & Anor* that such an application should also be accompanied with substantial grounds of appeal.

The failure by the prospective appellant to satisfy the conditions of appeal which have been regularly prescribed by the lower court is fatal since this means in essence that the appeal has not been perfected. It was in *Atung George Nkwain v Abong Emmanuel Fusi & Anor* held that the appellant who deposited the sum for the preparation of the records but failed to sign the recognizance to prosecute the appeal which was the second condition of the appeal had failed to perfect the entire appeal. Bearing this fact, the Bamenda court of appeal held that “the trial court was right when...it did issue a registrars certificate of judgment and non-appeal as at that date all the conditions of appeal had not been perfected.

The decision also held that the registrar was equally right to issue the writ of attachment and warrant of possession for the premises in terms of the judgment. It is on the authority of this

case obvious that an appeal can only be regarded as valid and pending when the conditions regularly given are perfected. This much is clear from the dictum of Bawak JCA in the case under reference that “this court has held time without number that where conditions of appeal are not perfected no appeal can be said to be pending hearing and determination by the court of appeal”.

An incidental issue which has a profound bearing on appeals is that relating to the actual practice of the court preceding the actual argument of the appeal in the appellate court. The court of appeal had in *The Liquidator, Satellite Insurance Co v Makia Mboe*²⁰⁴ held that an appellate matter will not be argued where the appellant has not paid the post appeal filling fee. The failure to pay the filling or argument fee was in the case herein the second reason why the appeal was struck out beside the fact that the appellant was absent.

Leave of court to file appeals against interlocutory orders

An important procedural issue with appeals relates to whether interlocutory appeals could only be filled after an order granting leave by the trial court to do so. The straightforward answer to this question is in the affirmative. An appeal on an interlocutory decision of the lower court which was entered without leave of court is incompetent for violating the express mandatory provision of Order 7 rules 3(2) of the Federal Supreme Court Rules 1961.

This principle was stated in *Namodo Emilia v Enanga Rebecca Ikome*²⁰⁵ where the court of appeal construed the above provision. The respondent in this appeal brought an objection in limine litis that being an interlocutory appeal, it should be dismissed because it was filed without leave of court.

²⁰⁴ Suit No CASWP/52/2006 Unreported.

²⁰⁵ Suit No CASWP/44/2006 Unreported.

To this, counsel for the appellant retorted by urging the court to allow the appeal since “failure to obtain leave of court was a mere irregularity which does not render the notice of appeal a nullity”. The appellants also cited the white book 1991 and submitted that under it the appeal ought to be allowed.

Based on these interesting submissions by counsel on both sides, Mbah Acha JCA easily preferred the contention of the respondent objector and struck out the appeal for being incompetent without leave of court. She agreed “with counsel for the respondent and appellant that as per Order 7 rule 3(2)...leave must be obtained before filling the notice of appeal against an interlocutory ruling like the ruling of the trial court.” It is interesting that the court identified an interlocutory judgment for which an appeal does not lie as of right as one in which the judgment or order involved does not finally dispose of the rights of the parties.

Where the order finally disposes of the rights of the parties it is a final order to which an appeal lies of right regardless of the nature of the proceedings. Relying on Lord Alverton’s dictum in *Bozson v Altrichan Urban district Council*²⁰⁶ she held that “the test looks at the order made and not at the nature of the proceedings.”

It must be stressed that filling an interlocutory appeal without leave of court is an irregularity which may be cured by going back to the trial court and obtaining leave. This explains why the court in this case declined the request by the respondent objector to dismiss the appeal opting rather to strike out the appeal thus giving the appellant the opportunity to go back and get leave.

What if leave that has been applied for is denied by the trial court? There are two possibilities. Here the party denied leave may opt to do the matter to the end and take up the issue after

²⁰⁶ Suit No CASWP/52/2006 Unreported.

^{221a} (2009) 1 CCLR 16.

final judgment or file an appeal against the ruling denying leave to appeal on the basis that the trial court exercised its discretion wrongly. If convinced, the court appeal would under its undoubted inherent jurisdiction do justice by granting leave to appeal against the interlocutory ruling. Where leave is granted, it is usual for the court of appeal to also stay the matter in the trial court pending the outcome of the interlocutory appeal.

Nature of grounds of appeal

The ground of appeal is an originating process because it initiates the cause that the appellate court determines. Counsel should be circumspect in couching it because the success of the appeal depends largely on the framing of the grounds of appeal. Mbeng JCA had in *Guinness Cameroon v Winter Transport*^{221a} noted that the ground of appeal are by definition complaints which are levelled on issues of fact and law or procedure in the case and which if upheld will lead to the appeal being allowed. The grounds of appeal are not meant to ridicule the judge or accomplish some fine academic and theoretical point which would not substantially affect the merit of the case.

It is necessary to note that there are clear rules which must be followed in the drafting of grounds of appeal for the Courts of Appeal and Supreme Court. Nana JCA had based on this held in the *Blassius* case²⁰⁷ that the omnibus ground of appeal is an attack on the findings of facts by the trial court and exclusively involves an examination of questions of facts. This ground of appeal according to this holding implies that the judgment of the trial judge cannot be supported by the weight of the evidence adduced by the successful party leading to the inference that the conclusion reached by the trial judge based on the accepted evidence cannot be justified in line with the

²⁰⁷ Suit No CASWP/44/2006 Unreported.

decision in Anyaoke Vs Adi. This being the case therefore, it is clearly incompetent for an appellant who has filed an omnibus ground to seek to introduce arguments on matters of law. Based on this, Nana JCA held in the Blassius case that:

“In the instant case, Counsel for the Defendant/Appellant dwelled again on the issue of the capacity of the parties in the judgment, and during the trial. This of course is an issue of law. The Courts of Appeal have held time and again, and their decisions abound, that the omnibus ground of appeal must contain only arguments of facts and not the law. See the judgment of this Court of Appeal in Suit N° CASWP/67/96 C.D.C. VS Akem Besong Benbella, Part III (1997) ICCLR at page 313-316, where the Court held that the omnibus ground of appeal which embodies both facts and law is improper and should not be considered. Questions touching on the capacity of parties are matters of law which cannot and should not be argued under the omnibus ground.”

Bawak JCA as he then was had in the earlier decision of *Mumah George Forsuh v Assangana N Joseph*²⁰⁸ held that the appellant would not be allowed to canvass legal arguments on points of law under the omnibus ground.

In spite of the principle articulated above, it must be emphasized that appeals are not to be subjected to undue technicalities that defeat the ends of justice. There are therefore certain situations where an appellate court will depart from a strict adherence to the rules. A ground on a point of law may for instance be taken on appeal even where this has not been specifically pleaded as a ground in the appeal. The court of appeal in the *Mumah George Forsuh v Assangana N Joseph* case confirmed that “an appellate court will of its own motion

²⁰⁸ (2001) 1 CCLR 100.

deal with a point which is disclosed by the evidence and which goes to the jurisdiction of the trial court”.

This according to Bawak JCA can be done “notwithstanding that such a point was neither raised at the trial nor argued on appeal.” Following this principle, Bawak JCA determined the appeal on a point not argued in both the trial court and the court of appeal for the purpose of doing substantive justice and avoid a situation where it “would be permitting a wrong to go without a remedy”. It has been held that the fulcrum of the matter in all appeals is whether the appellant has reasonably formulated his grounds of appeal in substantial compliance with the appellate rules of court notwithstanding the defects and absence of inelegance in the formulation.²⁰⁹

The reason for this objective approach was stated in *Nwakodo v Ohajuruka*.²¹⁰ Here, the court noted that so long as the other party (the respondent) is duly notified of the complaint sought to be made by the appellant, any questioning of the validity of the ground of appeal predicated on form rather than substance must fail. Preference for substantial justice to technicalities applies in this domain with the same force it does elsewhere.

Appeals operate to stay execution

Cameroon operates an autocratic and harsh legal system in which decisions of courts are deliberately debased and weakened by an executive arm of government which is not committed to true social justice or democratic governance for the benefit of her citizens. Unlike in most countries where a judgment takes effect immediately on pronouncement, courts decisions in the country are subject to two fundamental restrictions. As a rule, court judgments²¹¹ are subject to a 5%

²⁰⁹ Ibid.

²¹⁰ Labour decisions are exempt from this tax.

²¹¹ Labour decisions are exempt from this tax.

tax in addition to the usual registration fee which must be paid at the registry without which they cannot be enforced by the judgment creditor.

Secondly and very importantly is the devastating restriction caused by the rule that allows the mere filing of notice of appeal regardless of how worthless the grounds may be to operate to stay the decision appealed against. By section 2(1) of Law No 92/008 of 14th August, 1992 the filing of an appeal in civil matters from the high court to the court of appeal operates automatically to stay the execution of the decision appealed against. This undemocratic provision was construed in *Forminkong & others v Zih Martin & Anor*²¹² as having the effect of automatically staying the execution of judgment. Although this provision expressly excludes appeals from the court of appeal to the Supreme Court from operating to stay the judgment, it is in practice difficult to enforce such judgments as well.

What this regrettably means is that an investor who for instance gets a decision in his favour against a business partner who has breached a contract worth 100 million dollars cannot get his money back by enforcing the judgment if as is always the case the defendant mischievously files a simple omnibus ground of appeal. This restriction is all the more condemnable because appeals sometimes takes over five years to be heard and determined. It is hoped that this autocratic legal system will be reviewed in favour of the more civilized principle which proceeds on the assumption that a judgment creditor is entitled to the fruits of the decision without more.

Apart from the disincentive to investors which is caused by this un- fortunate practice where an appeal makes it impossible to enforce a judgment for years, the practice takes vital work from lawyers in two ways. It makes going to court unattractive for potential litigants thereby making lawyers more and more

²¹² Motion No BCA/11m/98-99 Unreported.

redundant. The few investors who come to the country to invest insist on jurisdictional clauses requiring disputes to be determined in their home countries in their investment contracts and transactions. This vote of no confidence in Cameroon's judiciary also affects lawyers negatively by eroding substantial legal business that would otherwise have been handled by them locally.

Labour appeals

Labour appeals are regulated by both the labour code and the ordinary provisions of the law on appeals in the country. With regards to the former, section 154(1) of the Labour Code has created and vested the parties in a labour action with the right of appeal. Under this provision, a party dissatisfied with the judgment of a labour court at the trial has as of right fifteen days to appeal against the judgment. Time to appeal under this provision starts running from the date of the pronouncement of the judgment in the case of a full hearing or from the date of service of the decision where the judgment was given by default²¹³.

The problem which has however often arisen in labour appeals is the procedural issue associated with the place for the filing of the appeal. This problem emanates from the non-specificity of section 153 (1) of the code which simply provides that an appeal may be lodged without indicating where this filing should be done. There are a variety of courts of appeal decisions which have held that this silence amounts to a lacuna that can be cured by a resort to the provisions of section 156 of the same code.

By the provision of section 156, all procedural matters not covered by the Labour Code have to be dealt with in accordance with ordinary law provisions. The rules of ordinary law would vary depending on whether the appeal is from the

²¹³ Section 154 of the labour code.

Magistrate/High courts or from the Court of Appeal as the case may be. These rules were in the case of the Court of Appeal identified as the Federal Supreme Court Rules 1961.²¹⁴

Appeal on Points of Law and Fact

An appeal may be on a point of law, facts or mix law and facts as the case may be. Since an appeal is a complaint about an error by the lower court, it is crucial that the appellant not only establishes the error of the trial court, but also shows in what way the error has resulted in a miscarriage of justice. An error of the trial court which did not cause a miscarriage of justice in the sense that it did not cause any prejudice to the appellant is academic and immaterial.

What is an appeal on a point of law or fact? It may be necessary to elaborate on this issue because many decisions have been lost on appeal because of poor appreciation of the distinction between an appeal on a point of law and one on a point of fact resulting in inarticulate formulations of grounds of appeals. In fact, the Court of Appeal and the Supreme Court have consistently decried such poor formulations of grounds of appeal in labour actions.

In *Catholic Education Authority V Atem Mary Musono*²¹⁵, reacting to a ground of appeal which stated simply that “the decision of the learned trial magistrate is erroneous in point of law”, the Court of Appeal Buea lamented the worthlessness of such a ground of appeal. Njie JCA in a unanimous decision of the panel stressed the absolute necessity for a ground of appeal to contain its particulars noting that anything less inevitably results in the ground being struck out. It is thus trite law that a ground of appeal in all cases²¹⁶ must allege the error of law complained against as well as state the particulars of the error

²¹⁴ See Order 7 of this Rules. See also Mbeng JCA in *S. N. E. C v Gerge Same Kumed Suit No CASWP/ L.4/2001 Un- reported*.1

²¹⁵ *Supra*.

²¹⁶ Civil and criminal.

preferably in separate paragraphs. The failure to identify the particulars of the errors complained of is fatal.

With regards to our initial question of “what is a point of law”, it is to case law that we must turn for the definition of a point of law. *Abbey v Alex* which presents a classical discourse on the nature of a point of law, regards it as a challenge on a question of law which generally speaking is capable of three possible meanings. These meanings were identified as:

- * It could mean a question the court is bound to answer in accordance with a rule of law. This excludes the exercise of discretion in answering the question as the court thinks fit in accordance with what is considered to be the truth and justice of the matter. Concisely stated a question of law in this sense is one predetermined and authoritatively answered by the law;

- * The second meaning is as to what the law is. In this sense an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. The question of law in this sense arises out of the uncertainty of law. A question of the construction of statutory provision falls within this meaning;

- * The third meaning is in respect of those questions which are committed to and answered by the authority which normally answers questions of law only. Thus any question which is within the province of the judge instead of the jury is called a question of law, even though in actual sense it is a question of fact. The cases which readily comes into this category are the interpretation of documents, often a question of fact but is within the province of a judge and also the determination of reasonable and probable cause for a prosecution in the tort of malicious prosecution which is one of fact, but is a matter of law to be decided by the Judge.

This definition is so comprehensive that it is difficult to add to it. A ground of appeal that does not raise elements

reflected in any of the above possible meanings cannot be said to be on a point of law and would be treated as a ground of appeal on a point of fact.

The nature of an appeal on point of fact was also discussed in the *Abbey V Alex* case with reference to the idea of a question of fact. A point of fact was in the same decision defined in connection with the issue of a question of fact as involving three possible definitions thus:

- *. Any question which is not determined by a rule of law;
- *. Any question except a question as to what the law is;
- *. Any question that is to be answered by the jury instead of by the judge.

The court also went ahead and distinguished between a question of law and that of fact. This distinction the court noted lies in the fact that “matters of fact are matters, circumstances, acts and events which in legal controversy are determined by admissions or by evidence as distinct from matters of law which are determined by authority and argument”.

Establishing a clear distinction between law and facts for the purpose of appeals assumes increased importance in appellate actions in the Supreme Court. This is so because of the Supreme Court’s practice of consistently declining to entertain appeals which in substance require it to review the facts and merits of the judgment appealed against. This practice was typically illustrated in *Manga Amougou Luc V SODECOTON*²¹⁷. The appellants who were aggrieved by a labour judgment of the Court of Appeal of the North region filed an appeal challenging the decision in the Supreme Court. The grounds of appeal alleged the violation of section 39 of the Labour Code amongst others.

²¹⁷ Supra.

The court after pointing out that it was by its practice confined to a consideration of only appeals on issues of law dismissed the appeal. The court indicated that the appeal was brought under the pretext of a violation of the law in order to cause the Supreme Court to appreciate the facts of the case. This decision is a schematic one which must be criticized for being difficult to follow. However, although it is true that a ground of law cannot realistically be completely unconnected to the facts of the case, the rule in *Pamol Plantation Ltd v Willian Nango Kimbeng*²¹⁸ shows that a ground.

The court of appeal Bamenda held in this case that a ground of law which raises factual complaints is bad in law. Such a ground should not be considered “by an appellate court on the basis of established procedural law and jurisprudence from a series of cases including the decision in *CDC v Akem Besong*²¹⁹ of law should not incorporate issues of fact.

The hearing and determination of all appeals are based on the facts and issues canvassed at the lower court. The circumspect appellant ensures that the records of appeal transmitted by the lower court accurately contain the facts, issues and decision of the case appealed against. This broad principle was demonstrated in *Bikoi Bikoi & 2 others v Epey Mbeng Samuel*²²⁰. Here Mbah Acha JCA made the point quite clearly that the records of proceedings is the authentic evidence of what happened at the lower court in the decision on appeal. Based on this, the court of appeal suo-moto ordered the lower court to send the record book to it in order to ascertain the date that the judgment appealed against was delivered.

In the case under reference, the production of the record book helped the court of appeal resolve the issue of the time the judgment was delivered. The respondent’s argument that the appeal was filed out of time was dismissed as the records

²¹⁸ *Supra*.

²¹⁹ (1997) 1 CCLR Part 3 316.

²²⁰ Suit No CASWP_27 2006 Unreported

showed that from the time the lower court delivered the decision to when the appeal was filed was still perfectly within the three months period for filing appeals. Although the appellate court ordered that the record book be produced *suo-motto*, this was clearly an unusual approach. The standard practice is for the party who complains that the records are incomplete to bring an application on notice in the court of appeal to reconstitute the records by adding the missing records.

Mbeng JCA held in *Richard Enonchong & Anor v MMM Enonchong* that the court will order the lower court to reconstitute the records on proper case shown. This is a discretion that the court will invariably grant as to do otherwise will pollute the course of justice. The application should be supported by affidavit demonstrating that part of the records in the trial court has been left out of the transmitted records. Suffice it to say that the court of appeal has jurisdiction to order that the records be reconstituted from counsel notes and court papers if the lower court cannot produce them.

Interlocutory Applications in the Court of Appeal

The court of appeal does in the course of hearing and determining appeals deal with a wide variety of preliminary applications. It has both inherent and statutorily vested jurisdiction to hear and resolve intervening issues and matters during the hearing of the substantive appeal before it. This is consistent with the nature of appellate courts universally and cannot be otherwise with the court of appeal in Cameroon. It must be pointed out rather clearly that although the court of appeal has wide discretionary powers to hear preliminary motions, under no circumstances will the court sit on appeal over its decisions in the purported exercise of this discretion.

The decision in *Seme Noungon v Me Charles A. Taku & others*²²¹ illustrates this principle graphically. Here counsel in an application by way of motion on notice prayed the Court of Appeal Buea that “the 2nd Respondent Act to wit “notification of a court ruling-Command to pay” dated 19/02/2007 and served on the Applicant on the 28/02/07 be set aside and/or quash”. Counsel argued that the “notification” put the interest rate at 7.5% for 3 years 9 months whereas by virtue of Section

2(3) of Law NO 2004/015 of 21st April 2004 to fix the statutory interest rate for decisions delivered by courts, interest shall be calculated as of the date of notification of the enforcement decisions. He further contended that the cost of notification is fixed at 40,000 francs CFA whereas Decree N^o 79/85 of 13th March 1979 fixing the tariffs rates is to the effect that cost shall be fixed at 250 francs each.

Learned counsel also importantly argued that the ruling in CASWP/39M/C/2006 in which the Applicant was party is irregular having been delivered by a single judge in violation of the provisions of Section 21(1) of the Law 2006/015 of 29 December 2006 which is to the effect that all matters heard by the court of Appeal should be heard by three judges. In delivering its decision, the Court of appeal criticized counsel’s submission “praying this court to declare a ruling delivered by a judge of this court a nullity.” It dismissed the application because it “in effect is tantamount to requesting this court to exercise appellate jurisdiction over its own judgment” noting that “from the moment this court through one of its judges handed the ruling in CASWP/39/C/2006 the court became *functus officio*.”

However, it was on the second issue, agreed with applicant’s counsel that following the provisions of section 2(3) of Law NO 2004/015 of 21st April 2004 to fix the statutory interest rate for the enforcement of decisions delivered by

²²¹CASWP/39M/C/2006/1M/2007

courts and the interest rate in contractual matters, interest shall be calculated as from the date of notification of the enforceable decision. Moreover, the cost of notification is fixed at 40,000 francs CFA whereas Decree NO 79/85 of 13th March 1979 to fix the tariff rates is to the effect that cost sought be fixed at 250 francs CFA.

It was therefore in total violation of the provisions of these Laws that the Bailiff's notification fixed the interest rate at 7.5% 3 and the cost at 40,000 francs CFA. By virtue of Section 92 of the Uniform Act on Simplified Recovery Procedures and Measures of Execution, this violation is sanctioned by nullity of the notification command to pay.

Further Evidence on Appeal

An incidental question which interestingly cuts across all appeals is whether either party to a pending appeal can call additional evidence to buttress their case. This issue was neatly raised in *Omog Ettiene v Cameroon Airlines*. This was an application by the applicant for leave to adduce further evidence on appeal. The substantive matter itself was a labour appeal in which the applicant wanted to tender a document showing that he was refused a job because of the absence of a certificate of service. He also sought to tender two statements of non-conciliation as well.

On these facts, M. A. Mbeng JCA rejected the application for further evidence on appeal. In doing so, the erudite Justice identified the principle upon which such applications could be granted thus:

“The circumstances which this court will grant leave to a party to adduce additional evidence is when the evidence concerning the matters have occurred after the date of the trial or hearing of the suit in court. Apart from this, leave can only be granted on special grounds”

Following this rule, it was held that “since the documents were known by the applicant at the trial” his failure to call evidence of them was fatal. The statement of non-conciliations Mbeng JCA noted were irrelevant since there are equivalent to pleadings and not evidence as such. Although the decision did not address what will amount to a special ground, it is apparent that this will depend on the peculiar facts of each case. Suffice it to say that evidence which is crucial and certain to substantially affect the appeal stands an excellent chance of being allowed in under heading.

Striking out and relisting appeals

The court of appeal like every tribunal involved in dispensing justice will normally not encourage litigants and counsel to trivialize the judicial process. It will for this reason strike out any appeal or application which is pending before it where it comes to the conclusion that the cause has not been diligently prosecuted. Non diligent prosecution may take a variety of forms. Generally, however, this is demonstrated by the non-appearance of parties and their counsel, failure to file submission, failure to pay relevant fees etc.

Normally, the order striking out is made on the oral application of the opposing party, yet the court has the discretion to determine when this has become necessary and could do so suo motto. The court will do so where like in *Ngangmufuh F Martin v Zangue Pius* neither party was in court when the appeal was called. It was in this case however held by the full bench of the court of appeal that the reason for the party or parties not appearing must be looked at carefully.

Since the overriding objective of the court is to do justice, the court of appeal equally has undisputed discretion to order for the relisting of the application or substantive appeal that has been struck out on due cause shown. What will amount to due cause or put differently when will it be just to relist a cause that has been struck out? Each case will depend on its peculiar

facts and circumstances. Order 7 rule 21(2) of the Federal Supreme Court Rules provides the guiding principle regulating this issue. Under it, the court may direct that an appeal that has been struck out be relisted on “terms as to costs or otherwise as it may deem just.”

After construing Order 7 rule 21(1) of the 1961 rules, Inglis JCA held in *Ngangmufuh F Martin v Zangue Pius* that the points which must be considered in an application for relisting are:

- The reason for the applicant’s failure to appear when the case was heard
- Whether there has been undue delay (in bringing the application)
- Whether the respondent will be prejudiced or embarrassed by an order for hearing being made so as to render it inequitable to permit the case to be reopened.

On reviewing the above factors, the court held rightly that the reason given by the applicant in this case was reasonable and ordered the appeal to be relisted for determination on the merits. Because the applicant had shown that it was the first time that the appeal was fixed for hearing, Inglis JCA held that “one more adjournment to a further date would not have embarrassed or prejudiced the respondent.” It was also noted in this case that the fact that the applicant filed the motion to relist timeously was a plus in favour of relisting. Indeed, the court criticized the single justice who heard the application for getting involved in trying to anticipate the merit of the appeal and dismissing the application for what he thought the real appeal would have been.

Garnishe Orders and Stay of Execution

Garnishe Orders

Although traditionally the judgment creditor is obliged to seek out and enforce the court judgment and orders against the named defendant judgment debtor in the action, sometimes the enforcement of a court decision may require tracing the funds of the judgment debtor to a third party. The third party would in this circumstance not be a party in the action in which the decision was giving. Except for this, it is impossible for a decision to be enforced or executed against a party who was not a defendant in the action in which the judgment was given. To do so will be unconstitutional since by the preamble of the Constitution 1996 read alongside article 65, to execute a decision against someone who was not a party in the action is a violation of the right of fair hearing against the latter. No civilized system will allow such a legal aberration.

The garnishee proceedings permits a judgment creditor to attach a recalcitrant judgment debtors funds in the hands of a third party like a bank if the debtor fails to honour the judgment and pay it over to the judgment creditor. Although the common law courts have for long used this procedure, the garnishee procedure is currently regulated by article 153-172 of part IV book II of the OHADA Uniform Acts organizing the simplified recovery proceedings and measures of execution. Admittedly the garnishee is conceptually the same both under the common law and the OHADA dispensation yet there are significant points of differences between them in the two procedures. This book treats the garnishee from an OHADA

perspective because the latter has modified much of common law practice to the point of attenuating the latter.

Conditions for the adoption of garnishee proceedings

Generally, the garnishee procedure can only be resorted to where there is a final decision of a court with competence. This principle is imperative because article 33 of the Uniform Act makes a judgment an enforceable right amenable to the enforcement procedure under the OHADA dispensation. This provision must be read with article 153 of part IV of book 11 stating that:

“any creditor in possession of a writ of execution showing a debt due for immediate payment may, in order to secure payment of the debt seized in the hands of a third party the debt owed by his debtor in the form of a sum of money subject to the special provision relating to attachment of earnings”

This broad dispensation was interpreted in *Affair Société Afrocom-Ci of Citibank* by the apex court of the OHADA legal system. Here, the CCJA noted clearly that for the proceedings to lie, there must be a judgment against the judgment debtor and that the judgment debtor must have his funds in the hands of a third party. The court in further clarification defined the notion of a third party as relating to “a person who has in his keeping and independently, sums of money belonging to the debtor”.

The rules of the Uniform Acts with regards to the garnishee proceedings from the interpretation given in the *Affair Société Afrocom* case brings individuals, banks and all financial institutions performing the functions of banks within the contemplation of the third party (garnishee) against whom the proceedings may lie. Such institutions like post offices, saving banks, corporative societies who are keeping the funds

of the judgment debtors could be ordered through the garnishee procedure to pay over the money in their keeping to the judgment creditor.

The procedure cannot however be used to attach money in the hands of the employee of the judgment debtor. It is plain from the provisions of article 153 of the Uniform Act that only the liquidated debt due and certain that can be the subject of garnishee proceedings. It was thus held by the Court of Appeal in Buea in *Camtel V Pastel*²²² that it is only where there is judgment for a liquidated award that the garnishee procedure can be used to enforce it. Given the strictness of the interpretation of the OHADA procedure by the CCJA in *Société Banque Commerciale Du Niger v Hamadi Ben Damma* it certainly cannot be otherwise.

Procedure for garnishee proceedings

Under the common law all the judgment creditor who after a diligent search discovers that a third party like a bank etc. is keeping funds belonging to the judgment debtor needs to do is to file a motion supported by an affidavit to detain the money. The third party is made a party in the motion. The current procedure including in the Anglophone courts is a mixture of the OHADA law and curious executive practice direction given by the minister of justice.

Circulars No 17 of 4/6/2002 and another of 12/7/2002 by the minister of justice and keeper of the seals have made the service of preliminary summons to pay on the judgment debtor a condition precedent for the attachment of a debt in the hands of a third party. In spite of these executive circulars, the requirement for the service of the preliminary summons to pay is in reality a function of article 92 of part IV of the Uniform Acts which must be scrupulously respected. Under this provision the summons must be served by a bailiff on the

²²² Suit No CASWP/48/2002.

judgment debtor “at least eight days before the seizure” and “must mention the writ of execution” authorizing the garnishee proceedings.

By the same provision, an account of the sums claimed “in principal, cost and accrued interest” including an indication of the interest rate must be attached to the garnishee documentation to be served on the debtor. The procedure is far more technical under the current OHADA dispensation than it used to be under the common law. Indeed, by article 92 already cited any non-compliance with the prescribed requirements renders the proceedings void unlike under the common law where technicalities are not allowed to defeat the ends of substantial justice.

The next step is for a bailiff and not a court to prepare and serve a writ of attachment on the third party under article 157 of part IV.²²³

The writ of attachment must contain the items prescribed in article 157 otherwise it is on the authority of the CCJA decision in Arrêt N° 007/2002 null and void. The CCJA had in fact quashed the decision of the court of appeal Duala allowing a writ of seizure which did not indicate the accrued interest which is currently fixed at 6% under Art 2 of Law No 2004/015 of 21/4/2004. Unlike under the common law, only the actual amount and incidental cost are attached under the OHADA garnishee procedure.

Citing Art 164 of the Uniform Act and Ordinance N° 1364 of 5th September, 2002, Mba Acha²²⁴ has noted that the attachment of the sum with a third party must be disclosed to the judgment debtor within 8 days otherwise the garnishee process will be absolutely void. She states rather correctly that the disclosure must be by deed which deed must contain four elements. The deed must have attached to it a copy of the writ

²²³ Art 157 part IV Uniform Acts.

²²⁴ Mba Acha op cit at 7.

of attachment and an indication in bold letters that (1) an opposition may be raised (2) such opposition is admissible only if made within a month from notification or service of the deed (3) the date when the period shall expire and (4) the court in which disputes may be determined.

Mba Acha's view is in tandem with the CCJA's very strict interpretation of the above requirement in *Société Banque Commerciale Du Niger v Hamadi Ben Damma*²²⁵. The OHADA apex court declared in this action a deed of disclosure null and void for omitting to indicate the date of expiration and the court for the determination as in items 3 and 4 above. Equally significant is Art 156 of the Uniform Act which requires the third party to declare the sum it is holding for the judgment debtor with the result that a failure in this regard makes the third party liable to the judgment creditor for the amount due including damages.

Provisional Execution

Provisional execution is a conditional enforcement of the decision of a court. This is a typically French legal notion developed by the civil law to ameliorate the harshness of the autocratic practice of not allowing judgments to be enforced on pronouncement. Both have been introduced into Cameroon and extended to the courts in the Anglophone regions because of a deliberate policy of weakening the judiciary by an overbearing executive that has put the courts under its influence.

There are two types of provisional execution viz: discretionary provisional execution and provisional execution as of right. The mandatory provisional execution on the other hand is one imposed by law in a statute as of right. Here the judge has no discretion since a statute has stated that certain judgment or ruling must be automatically enforced by way of a

²²⁵ Arrêt N° 008/2004 of 26/2/2004.

provisional order of execution. An excellent example for the Anglophone courts is provided by section 76 of the Civil Status Registration Ordinance 1981 which makes alimony for a deceased wife and children in a judgment mandatorily enforceable by a provisional order of execution.

The discretionary provisional execution occurs in situations where the judge uses his discretion to make the order in cases in which the law has specifically provided for. A good illustration of this is to be found in article 3 of Law No 92/008/14/8/92 which provides thus:

“Notwithstanding the provisions of section 2(1) above a court seized of a matter may in case of a judgment delivered after full hearing or considered to have been delivered after full hearing order the provisional execution of the judgment regardless of an appeal”

Art 3 has identified the cases in which this discretion could be ordered to include:

- Matters relating to maintenance claims, contractual outstanding debt, eviction based on the land certificate which confers unchallenged rights or a written lease.
- Compensation for damage resulting from acts causing bodily harm for covering justified expenses and costs incurred to meet emergency medical treatment in particular costs of transportation or transfer of person concerned, cost of drugs hospitalisation and medical expenses.
- In cases relating to undisputed salaries

Asuagbor CJ has held in *Yonta Maurice Ngosso v Ouambo*²²⁶ that an order of provisional execution will be reversed where the justice of the case demands that the status

²²⁶ CASWP/21m/C/2007 Unreported.

quo be maintained so that the appeal will not be made nugatory. The case was an application by way of motion on notice wherein applicants through counsel prayed for the stay of execution and or variation of the conditions as contained in the judgment N^o. LM/116/05-06. The lower court had ordered defendants to deliver immediate possession to the plaintiff notwithstanding any appeal pursuant to Section 3 (1) of Law No 92/008 of 14 August 1992 as amended by Law N^o. 97/018 of 7/8/97.

This decision dealt with the issue from three perspectives viz: the admissibility of the application, the competence of the court to vary the judgment of the lower court and whether the application for stay is grounded. On the first issue, the learned CJ held that “under our procedure where files are first brought to the Chief Justice for assignment and constitution of the panel”, it is not possible for an applicant for a stay to know ahead of time the date of hearing in order to communicate same to the other party within 5 days as requested by law. She concluded consequently that “failure to notify the date of hearing within 5 days cannot be attributed to the applicant who should not be made to suffer as a result of administrative bottlenecks.” This in simple terms establishes the solid principle that a party would not be punished for the failings of the registry whether in the court of appeal or at the trial court.

On the second issue, the learned CJ declined the prayer to vary the conditions as contained in the judgment N^o. LM/116/05-06 on the basis that since “this court is sitting as a court of original jurisdiction in matters of applications for stay of provisional execution”, it cannot in this capacity arrogate to itself the powers of an appellate court sitting on the substantive appeal”, before concluding that “we lack the competence to vary the contents of the orders of the lower court.”

.The court of appeal in effect conceded that the law on the enforcement of court judgments empowers the court to do no more than order or refuse an application for stay of provisional

execution order made by the lower court. Turning to the last issue, the court observed that the question is whether the provisional execution order was made in accordance with the provisions of the law before concluding that:

“The question here is not whether the respondent has a land certificate but whether the land certificate confers unchallenged rights on its owner. At the lower court, in their notice and grounds of appeal and before this court applicants have always raised the crucial issue of vacant possession in other words challenged the rights of the owner to enter into possession. In order not to render the appeal nugatory, we shall refrain from examining this issue but having regards to its fundamental nature in the determination of the rights of parties; it is in the interest of justice that the parties maintain the status quo ante.”

Section 146 of the labour code provides a general power for a labour court to order the immediate execution of parts of the awards of a labour judgment notwithstanding any motion for a stay of execution or any appeal. This award which could be made suo-moto is generally referred to as an order of “provisional execution”. Although section 146 identifies the kind of awards recognized as wages and prerequisite indisputably due, it is as already stated law N° 92/008 of 14 August, 1992, which sets out the details of the principles regulating the enforcement of Court judgments including, of course, Labour actions.

Section 3 of this law states amongst others that a court seized of a matter concerning the payment of salaries, wages and leave allowances due, may, in case of a judgment delivered after full hearing or considered to have been delivered after full hearing, order the provisional execution of the judgment regardless of an appeal. The order of provisional execution, must to be competent, adhere scrupulously to the provisions of section 3 above. Firstly, it is from a plain interpretation of this provision clear that an order of provisional execution cannot

be made except where the judgment is on the merit. An order of provisional execution cannot be made to enforce an award in a default judgment.

Secondly, it has to be established that the award relates to “salaries, wages and leave allowances due” before an order for provisional execution can be made. The incontrovertible position is that provisional execution cannot be ordered for salaries, wages or leave allowances which have not become due. A labour court is certainly not at liberty to award claims for salaries and wages which are prospective since such an award cannot by the terms of section 3 be the subject of an order for provisional execution.

This statutory position was affirmed by the Supreme Court decision in *University of Buea V Mbua Teke Daniel*²²⁷ where the trial high court in Buea had found for the plaintiff worker and awarded him the sum of 5,214,420 francs amongst others. This particular award was for the worker’s wages for the four years of service for which the worker would have worked had he been allowed to reach the retirement age of 60 years. The trial court ordered provisional execution of this amount regardless of any appeal and the order of provisional execution was confirmed by the South West Court of Appeal. The Supreme Court held however that the order of provisional execution in the circumstances of the facts of the case “did not fall within the ambit of section 3 of law No 92/008/of 14 August 1992”²²⁸.

In reversing both courts, the Supreme Court justified its decision on the basis that these salaries were not already earned but “in futuro, covering as they did the four years period between the date of his forceful retirement at age 56 and the

²²⁷ *Supra*.

²²⁸ These were the views that formed the basis of this decision. See folio 6 of the complementary report by Justice Epuli. However the appeal was declared inadmissible because it was filed after the 15 days limit for the filling of labour appeals.

statutory retirement age of 60 years”. It is obvious from this decision that provisional execution can only be ordered where the award are for wages, salaries or allowances which has become indisputably due.

Apart from the fact that wages must become due before the order may be made, provisional execution is further subject to the principles indicated in *Harp Distribution Services v Nfonba B Joseph*²²⁹. M A Mbeng JCA clearly identified these further principles as follows:

Where the amount awarded is less than 600.000 FRS without a surety by virtue by a Prime Ministerial Decree No 93/754/PM of 15/12/1993.

Where the award is more than 600.000 FRS the judgment debtor must furnish a surety.

Where the amount awarded is more than 600.000 FRS the court may still order provisional execution provided the award relates to salaries and prerequisites not contested or disputed.

The court however was rather firm in the view that neither notice to pay, severance pay, medical bills and allowance in lieu of salary were “part of a salary or a prerequisite or an accessory to a wage or salary.”²³⁰

Proceeding from the premise that these items were neither salary nor accessory to it, the court stayed the execution of the provisional execution for awards made covering them.

No reference was however made to the impact of the new Uniform OHADA rules on the application to stay. B Martor et al has identified the enforcement measures created under the Uniform Act as falling into two broad categories viz (a) the provisional measure whereby a creditor can secure a debt pending a final judgment on the merit and (b) measures of

²²⁹ Suit No BCA/1LM/2008 Unreported.

²³⁰ The court held that house allowance, seniority bonus and transport allowance are perquisite while describing payment in lieu of notice and severance pay as damages awarded to a deserving party in a termination of employment suit.

execution whereby a creditor can enforce a judgment against the assets of his debtor.²³¹ While it is a compelling fact that the first scenario has no application with regards to labour decisions, the same conclusion cannot be reached with the second.

A labour judgment is certainly an enforceable right on the basis that it is “a court decision which has been declared enforceable” as defined by Article 33 of the Uniform Acts.²³² This being the case, it is subject to the Uniform Acts and in particular the OHADA rules on the stay of execution. The commencement of the execution of a labour judgment may take the form of the seizure of the goods of the judgment debtor under Article 49 or the attachment of his funds pursuant to Article 163 and 104 of the Uniform Act.

Article 104 has created a regime under which the judgment debtor can within 15 days object to the seizure of his funds or asset by way of an application presumably in the court that ordered the enforcement.

The court under this procedure “may either order payment to be made to the creditor or refund of the funds to the debtor...” It is plain from the penultimate sentence of Article 104 that the court can stay the execution of the judgment by an order that the seized assets be returned to the judgment debtor.

The stay is a function of the OHADA Uniform Acts and not the usual legislation on appeals as it will appear from some of the decisions above. The court in staying a decision under Article 104 can in the alternative order the funds of the debtor to be held by a third party pending the final outcome of the enforcement proceedings. There are no hard and fast rules regulating stay of enforcement under the new OHADA approach as the matter is largely left to the appreciation of the

²³¹ B Mator et al *Bussiness Law in Africa: OHADA and the Harmoniza5on Process* London 2002: 231.

²³² B Mator et al *op cit* at 232.

judge who must however act judiciously in the interest of justice.

However, and as it would be expected by the demands of a just system of the administration of justice, a judicious exercise of this discretion should of necessity prioritize the fact that a judgment creditor should not be casually deprived of enjoying the benefits of the judgment. Equally important on the other side of the pendulum is the fact that a patently irregular decision should not be speedily enforced.

It seems obvious that OHADA rules have further weakened the capacity of a judgment creditor to enforce a decision given in his favour. It must to this extent be criticized for further weakening the notion of justice for the society at large. This is all the more so, as objection to enforcement are themselves proceedings which are subject to the full appellate procedure in the country's legal system.

Stay of Execution

Democratic legal systems the world over generally recognize that justice is best served for the litigants and society at large when court decisions are allowed to take effect on pronouncement. This principle was expressed in England as far back as 1886 in the *Annot Lyle*²³³ when Bowen L J held that “a winning plaintiff or party has a right to the fruits of his judgment” while noting that “the courts will not make a practice at the instance of an unsuccessful litigant of depriving a successful one of the fruits of the judgment in his favour.

Expressed differently, the above principle means that a judgment is valid and effective until set aside after a regular decision of an appellate court. To stop the judgment from having this effect before an appeal is heard and determined is unusual and strange as it makes the entire judicial system meaningless in the eyes of litigants. However, as has been

²³³ (1886) 11 P D 144.

indicated already, the provisions of section 2(1) of law N° 008/14/8/1992 states that the filing of an appeal in civil cases stay the decision appealed against in Cameroon.

It is possible to stay the execution of an unappealed judgment even after the bailiff has commenced its execution. Although the conditions where this may be done may vary depending on the peculiar facts, it is settled that from the entry into force of Law N° 2007/001 of 19th April 2007 the competent court to determine the issue relating to difficulties in executing a judgment is either the president of the court that delivered the decision or a judge designated by him. An attempt to stay the decision of the court of first instance Kumba was rejected pursuant to article 3 of this law because the application was brought in the court of appeal which declared itself incompetent to hear the application.

Supreme Court Civil Procedure Rules

ORDER I APPLICATION

1. These rules may be cited as the Supreme Court (Civil procedure) Rules.

2. These rules shall apply only to civil causes, matters and procedure except in so far as they may be applied to criminal causes, matters, or procedure by rules made under any ordinance.

3. In these rules, unless the context otherwise requires, ‘solicitors’ means a law officer, legal secretary, crown counsel, or legal practitioner entitled to practice before the court.

ORDER II FORM AND COMMENCEMENT OF SUITS

1. Every suit shall be commenced by a writ of summons signed by a judge, magistrate or other officer empowered to sign summonses. The writ of summons shall be issued by the registrar, or other officer of the court empowered to issue summonses, on application. The application shall ordinarily be made in writing but the registrar or other officers as afore- said where an applicant for a writ of summons is illiterate may dispense with a written application and instead himself record full particulars of the oral application made and on that record a writ of summons may be prepared, signed and issued.

2. The writs of summons shall contain the name and place of abode of the plaintiff and of the defendant so far as they can be ascertained; it shall state briefly and clearly the subject matter of the claims, and the relief sought for, and the date (called the return day) and place (called the return place) of hearing.

3. Every writ of summons and also every other writ, shall bear date on the day on which it is issued.

4. Any alteration of a writ without leave of the court shall render the writ void.

5. In case service of the writ shall not have been effected within one year from the date thereof, the same shall become void. The court may at any time before the expiration of the current period from time to time renew the writ for a further period not exceeding six months at any one time.

6. A Plaintiff may unite in the same suit several causes of action, but the court if it thinks that such causes of action, or some of them, cannot be conveniently tried together, may order separate trials or may make such other orders as may be necessary or expedient for the separate disposal thereof, and may make such orders as to adjournment and costs as justice requires.

7. Causes or matters pending in the same court may by order of the court be consolidated, and the court shall give such directions as may be necessary with respect to the hearing of the causes or matters so consolidated.

ORDER III

PARTICULARS OF CLAIMS

1. (1) It shall be sufficient for the plaintiff to state his claim in his application for the writ of summons briefly in a general form, but he may deliver to the registrar at the time of making application for the writ of summons particulars of his claim in any form which shall give the defendant reasonably sufficient information as to the details thereof.

(2) Whenever the Plaintiff shall deliver such particulars he shall also deliver to the registrar as many duplicates thereof as there are defendants.

(3) Any judge or other officer empowered to sign writs of summons may, in his discretion, refuse to sign any writs of

summons until the plaintiff shall have delivered to the registrar such particulars and duplicates.

Provided that where the plaintiff is illiterate and unable to furnish particulars in writing, the particulars and duplicates thereof shall be prepared by the registrar from the dictation of the plaintiff or his agent.

(4) The registrar shall annex the particulars to the writ of summons, and shall annex a duplicate thereof to each copy of the summons for service.

2. The court may, on the application of the defendant, or on its own motion, order further or better particulars.

3. The plaintiff shall not, at the hearing, obtain a judgment for any sum exceeding that stated in the particulars, except for subsequent interest and the costs of suit, notwithstanding that the sum claimed in the writ for debt or damages exceeds the sum stated in the particulars.

4. Particulars of claims shall not be amended except by leave of the court, and the court may, on any application for leave to amend, grant the same on its appearing that the defendant will not be prejudiced by the amendment. Otherwise the court may refuse leave or grant the same on such terms as to notice, postponement of trial, or costs, as justice requires.

5. Any variance between the terms contained in the particulars and the items proved at the hearing may be amended at the hearing either at once or on such terms as to notice, adjournment, or costs, as justice requires.

6. Where a party seeks (in addition to or without any order for the payment of money) to obtain as against any person any general or special declaration of his rights under any contractor instrument, or to set aside any contract, or to have any bond bill, note or instrument in writing delivered up to be cancelled, or to restrain any defendant by injunction or to have an account taken between himself and any other party, and in such other case as the nature of the circumstances makes it

necessary or expedient, the plaintiff or defendant may, in the writ of summons or in any pleading, refer to and briefly describe any documents on the contents of which he intends to rely, and annex copies of such documents to the writ or pleadings, or may state any reason for not annexing copies which he may have to allege.

7. Such party shall allow the opposite party to inspect any such documents as are in his possession or power.

8. Whenever a writ of summons shall be issued on the application of any person, the registrar shall forthwith give or cause to be given to such person or his agent applying for the summons a hearing notice. Such notice shall also be served upon the defendant together with the writ of summons.

9. Whenever application is made to a court for the issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent's belief there is no defence thereto, the court shall, if satisfied that thereto, enter the suit for hearing in what shall be called the 'undefended list' and mark the writ of summons accordingly and enter thereon a date for hearing suitable to the circumstances of the particular case.

10. There shall be delivered by the plaintiff to the registrar upon the issue of the writ of summons as aforesaid, as many copies of the above mentioned affidavit as there are parties against whom relief is sought, and the registrar shall annex one such copy to each of the writ of Summons for service.

11. If the party served with the writ of summons and affidavit delivers to the registrar, not less than five days before the day fixed for hearing, a notice in writing that he intends to defend the suit together with an affidavit setting out the grounds of his defence, then and in such case the suit shall be entered in the general list for hearing.

12. Where any defendant neglect to deliver the notice of defence and affidavit as described in the last proceeding rule, within the time fixed by the said rule, the court may at any time before judgment is entered, on an affidavit disclosing a defence on the merits and satisfactorily explaining his neglect, let in the defendant to defend upon such terms as the court may think just.

13. Where any defendant neglects to deliver the notice of defence and affidavit, prescribed by rule 11, within the time fixed by the said rule, and is not let in to defend in accordance with the provisions of rule 12, then and in such case, the suit shall be heard as an undefended suit, and judgment given thereon, without calling upon the plaintiff to summon witnesses before the court to prove his case formally.

14. Nothing herein shall preclude the court from hearing or requiring oral evidence, should it so think fit, at any stage of the proceedings.

ORDER IV PARTIES

1. If the plaintiff sues, or any defendant counter claims in any representative capacity, it shall be expressed on the writ. The court may order any of the persons representing to be made parties either in lieu of, or in addition to, the previously existing parties.

2. Where a person has jointly with other persons a ground for instituting a suit, all those other persons ought ordinarily to be made parties to the suit.

3. Where more persons than one have the same interest in one suit, one or more of such persons may, with the approval of the court, be authorized by the other person's interest to sue or to defend in such suit, for the benefit of or on behalf of all parties so interested.

4. Where a person has a joint and several demands against more than one, either as principles or as sureties, it is not necessary for him to bring before the court as parties to a suit concerning that demand all the persons liable thereto, and he may proceed against any one or more of the persons severally or jointly and severally liable. Where a defendant claims, contribution, indemnity, or other remedy or relief over against any other person, he may apply to have such persons made party to the suit.

5. (1) If it shall appear to the court, at or before the hearing of a suit, that all the persons who may be entitled to or who claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the court may adjourn the hearing of the suit to a future day, to be fixed by the court and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case the court shall issue a notice to such persons, which shall be served in the manner provided by the rules of the service of a writ of summons or in such other manner as the court thinks fit to direct; and on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause.

Provided that a person so served, and failing to appear within the time limited by the notice for his appearance, may at any time before judgment in the suit, apply to the court for leave to appear, and such leave may be given upon such terms (if any) as the court shall think fit.

(2) The court may, at any stage of the proceedings, and on such terms as appear to the court to be just, order that the name or names of any party or parties, whether as plaintiffs and defendants, improperly joined, be struck out.

6. Any two or more persons claiming or alleged to be liable as partners may sue or be sued in the name of the firm in which they were partners when the cause of action arose; and

any party to an action may in such case apply to the court for a statement of the names and addresses of the persons who were, when the cause of action arose, partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the court may direct.

7. In case a writ states two or more distinct causes of suit but not by and against the same parties or by and against the same parties but not in the same rights, the writ may, on the application of any defendant, be amended or set aside, as justice may require.

ORDER V

PLAINTIFF OUT OF JURISDICTION

1. Where a plaintiff, on whose behalf or by whom a suit is instituted or carried on, either alone or jointly with another person, is out of the jurisdiction, or is only temporarily therein, he shall assign a fit place within the jurisdiction where notices or other papers issuing from the court may be served on him.

2. If it shall be made to appear on oath or affidavit to the satisfaction of the court that the defendant has a bona fide counterclaim against such plaintiff which can be conveniently tried by the court; it shall be lawful for the court in its discretion to stay proceedings in the suit instituted by such security to comply with the orders and judgment of the court with respect to such counterclaim as the court shall think fit.

ORDER VI

GUARDIAN FOR PURPOSES OF SUIT

1. Where on default made by a defendant in answering or otherwise defending the suit, after service of the writ, it appears to the court that he is an infant, or a person of weak mind or

unsound mind, so that he is unable of himself to defend the suit, the court may, if it thinks fit, on the application of the plaintiff, or guardian of the defendant for the purpose of the suit, by whom he may defend it.

2. Before such an order is made the court shall cause such notice as it thinks reasonable to be served on, or left at the dwelling house of the person with whom, or under whose care the defendant is, and also, unless the court sees good reason to the contrary, in the case of an infant not residing with or under the care of his guardian, to be served on or left at the dwelling house of his guardian.

3. Infant's or persons of weak minds or unsound mind may sue as plaintiffs by their committee or next friend, on such terms as to the liabilities for costs and otherwise of such committee or next friend as the court shall deem just.

ORDER VII

PLACE OF INSTITUTING AND OF TRIAL OF SUITS

Subjects to the provision of the Ordinance respecting transfer, the place for the trial of any suit or matter shall be regulated as follows.

1. All Suits relating to land, or any mortgage or charge thereon, or any other interest therein or for any injuries thereto, and also all actions relating to personal property, distrained or seized for any cause, shall be commenced and determined in the judicial division in which the land is situated, or the distress or seizure took place.

2. All Actions for recovery of penalties and forfeitures and also all actions against public officers shall be commenced and tied in the judicial division in which the cause of action arose.

3. All suits for the specific performance, or upon the breach of any contract, may be commenced and determined in

the judicial division in which such contract ought to have been performed or in which the defendant resides.

4. All other suits may be commenced and determined in the judicial divisional in which the defendant resides or carries on business. If there are more defendants than one resident in different judicial divisions; subjects, however, to any order which the court may, upon the application of any of the parties, or on its motion, think fit to make with a view to the most convenient arrangement for the trial of such suit.

5. In case any suit shall be commenced in any other judicial division than that in which it ought to have been commenced, the same may, notwithstanding, be tried in the judicial division in which it should have been commenced, unless the court shall otherwise direct, or the defendant shall plead specially in objection to the jurisdiction before or at the time when he is required to state his answer or to plead in such cause.

6. No proceedings which may have been taken previously to such plea in objection shall be in any way affected thereby; but the judge shall order that the cause be transferred to the judicial division to which it may be retained and proceed in the court in which it has been commenced, and such order shall not be subject to appeal.

ORDER VIII

GENERAL FORMS OF PROCESS

1. All warrants and writs of whatever description shall be a sufficiently addressed for execution by being directed to the Sheriff of Nigeria, or to the Sheriff, without any affix; but this provision shall not prevent any writ or warrant from being addressed to a person by name, or to a person named, and to officers of court generally, or to a native authority or a native court.

2. The sealing of any writ or process shall not be necessary in addition to the signature of the judge or other officer by

whom the same shall be signed, except in cases where sealing may be expressly directed by any Ordinance or rule of court or by any prescribed form.

3. The forms in the First Schedule, or forms to the like effect, may be used in all matters, causes and proceedings to which they are applicable, with such variations as circumstances require.

4. In the proceedings for which forms are not provided or prescribed by any subsequent rules or orders of court, the Chief registrar may be, subject to the approval of the court, from time to time frame the forms required.

5. The fees prescribed in Part 1 of the Second Schedule shall be payable by the party prosecuting a proceeding or asking for a service as therein provided in respect of the proceedings or services to which they relate and such fees may be waived or remitted by a judge on the ground of the poverty of the person chargeable therewith where it appears that there are substantial grounds for his taking the proceeding or asking for the service to be rendered.

Provided however that a judge may be, where he so thinks fit, order any party to pay any fees so waived or remitted.
(Substituted by 3 of 1947)

6. No fees are to be taken in respect of any proceeding where such fees would be payable by any Government department or native authority. Provided however that when any person is ordered to pay the costs of the Crown or any Government department or native authority in any case, whether criminal or civil, all fees which would have being payable but the provisions of this rules shall be taken as paid and shall be recoverable from such person.

7. Fees may be paid to the court concerned, I which case a treasury receipt shall be given to the payer or may be paid to a sub treasury or local treasury, in either of which cases the

treasury receipt given to the payer shall be sent to and retained be the court concerned.

8. The regulation in the Fourth Schedule shall govern the payment and disposal of fees and duties of the court officers in regard thereto.

(Added by 3 of 1974)

ORDER IX

SERVICE OF PROCESS

1. Service of a petition, notice, summons, order, or other document of which service is required, shall be made by the Sheriff or deputy Sheriff or by an officer of the court or by a the court, or by a constable, or by a person appointed therefore, either especially or generally, by a native authority or a native court; unless in any case the court otherwise directs.

2. The court may in any civil case, for reasons which shall seem to it sufficient, appoint any process to be executed by a special bailiff, who for the time being shall have the privileges and liabilities of an officer of the court. The expense of such special bailiff shall be defrayed by the court on whose application he is appointed, unless the court in any case sees reason to vary this rule

3. Unless in any case the court thinks it just and expedient otherwise to direct, service shall be personal; that is, the document to be served shall delivered to the person to be served himself:

Provided that where a party is represented by a solicitor or some person permitted under rule 1 of Order XV to appear on his behalf, service of any document may be effected on his representative unless the court shall have otherwise ordered.

4. Service shall be completely effected by the delivery of a duplicate or attested copy of any document without exhibitions of any original.

5. Where it appears to the court (either after or without an attempt at personal service) that for any reason personal service could not be conveniently effected, the court may order that service be effected either

(a) By delivery of the document to some adult inmate at the usual or last known place of abode or business of the person to be served; or

(b) By delivery thereof to some person being an agent of the person to be served, or to some other person, on it being proved that there is reasonable probability that the documents would in the ordinary course, through that agent or other person, come to the knowledge of the person to be served; or

(c) By advertisement in the Gazette, or in some newspaper circulating within the jurisdiction; or

(d) By notice put at the principal court house of, or some other place or public resort in the judicial division wherein the proceeding in respect of which the service is made is instituted, or at the usual or last known place of abode or of business of the person to be served.

6. When party to be served is in the service of another department of Government or of a native authority the court may transmit the document to be served and the copy thereof to the senior officer of the department of Government in the judicial division or place where the party to be served works or to the native authority in whose service is the party to be served, and such officer or native authority shall cause the same to be served on the proper party according.

7. Where partners are sued in the name of their firm, the writ or other documents shall be served either upon any one or more of the partners, or at the principal place within the judicial division of the business of the partnership upon any person having at the time of the service the control or management of the partnership business there; and such service shall be deemed good service upon the firm.

8. When a suit against a British corporation or company authorised to sue and be sued in the name of an officer or trustees, the writ or document may be served giving the same to any director, secretary, or other principal officer or by leaving it at the office of the corporation or company.

9. When the suit is against a foreign corporation or company having an office and carrying on business within the jurisdiction and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving the same to the principal officer of such foreign corporation or company within the jurisdiction.

10. Where the person on whom service is to be effected is living or serving on board of any ship, it shall be sufficient service to deliver the writ or document to the person on board who is at the time of such service apparently in charge of such ship.

11. Where the person on whom service is to be effected is a prisoner in a prison, or a lunatic in an asylum, it shall be sufficient service to deliver the writ or document at the prison or asylum to the superintendent or person appearing to be the head officer in charge thereof.

12. Where the suit is against a defendant residing out of, but carrying on business within, the jurisdiction in his own name or under the name of a firm through an authorized agent, and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving it to such agent, and such service shall be equivalent to personal service on defendant.

13. Service out of the jurisdiction may be allowed by the court whenever the whole or many part of the subject – matter of the suit is land or stock or other property situate within the stock, or property; and whenever the contract which is sought to be enforced to rescinded, dissolved, annulled or otherwise affected in any such suit, or for the breach whereof damages or other relief are or demanded in such suit, was made or entered

into within the jurisdiction; and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction.

14. Every application for an order for leave to serve a writ or notice on a defendant out of the jurisdiction shall be supported by evidence by affidavit or otherwise, showing in what place or country such defendant is or probably may be found and the grounds upon which the application is made.

15. Any order giving leave to effect service out of the jurisdiction shall prescribe the mode of service, and shall limit a time after such service within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served, and the court may receive an affidavit or statutory declaration of such service having been effected as prima facie evidence thereof.

16. Where the officer of court or person charged with the service of any writ or document on any person is prevented by the violence or threats of such person, or any other person in concert with him, from personally serving the writ or document it shall be sufficient to inform the person to be served of the nature of the writ or document as near such person as practicable.

17. In all cases where service of any writ or document shall have been effected by a bailiff or other officer of court a certificate of service signed by such bailiff or other officer shall, on production, without proof of signature, be prima facie evidence of service.

18. The costs of and incidental to the execution of any process in a suit shall be paid in the first place by the party requiring such execution, and the sheriff shall not (except by order of the court) be bound to serve or execute any process unless the fees and reasonable expenses thereof shall have been previously paid or tendered to him.

19. Service shall not be made on a Sunday or public holiday, unless the court directs otherwise by order endorsed on the document to be served.

20. A book shall be kept at every court for recording service of process, in such form as the Chief Justice may direct, in which shall be entered by the officer serving the process, or by the registrar, the names of the plaintiff or complainant and defendant, the particular court issuing the process, the method, whether personal or otherwise, of the service and the manner in which the person serving ascertained that he served the process on the right person, and where any process shall not have been duly served, then the cause of failure shall be stated and every entry in such book or an office copy of any entry shall be prima facie evidence of the several matters therein stated.

ORDER X

SERVICE IN NIGERIA FOR FOREIGN TRIBUNALS

1. Where in any civil or commercial matter pending before such court of a foreign country a letter of request from such court or tribunal for service on any person within the jurisdiction of any process or citation in such matter is transmitted in the Supreme Court by His Majesty's Secretary of State for the Colonies or the Governor General with an intimation that it is desirable that effect should be given to the same, the following procedure shall be adopted:

(a) The letter of request for service shall be accompanied by a translation thereof in the English Language, and by two copies of the process or citation to be served, and two copies thereof in the English language;

(b) Service of the process or citation shall be effected by an officer of the court, unless in any case the court thinks fit otherwise to direct;

(c) Such service shall effected by delivering to and leaving with the person to be served one copy of the process or citation to be served, and one copy of the translation thereof, in accordance with the rules and practice of the Supreme Court regulating service;

(d) After service has been effected the officer of the court or other person who has effected the same shall make an affidavit of service before a magistrate to whom he shall also furnish particulars of charges for the cost of effecting such service. The magistrate after verifying such affidavit under his seal of office shall transmit the particulars of charges and the affidavit with one copy of the process thereto annexed to the Chief Registrar;

(e) The particulars of charges for the costs of effecting service shall be examined in his capacity as taxing master of the court by the chief Registrar, who shall have power to direct the same to be verified in such manner as he may think necessary. The chief registrar shall certify the correctness of the charges or such other amount as shall be properly payable for the cost effecting such service, and a copy of such charges and certificate shall be forwarded by the chief justice to the Governor General;

(f) The Chief Registrar shall send to the Chief Justice and the Chief Justice shall transmit to the Governor General the letter of re- quest for service received from the foreign country, together with the evidence of service, with a certificate appended thereto duly sealed with the seal of the Supreme Court.

2. Where in any civil or commercial matter pending before a court or tribunal in any foreign country, with which a convention on that behalf has been or shall be made and applied to Nigeria, a request for serviced of any document on a person in Nigeria is received by the Chief Justice from the consular or other authority of such country to fellowship

procedure shall subject to any special provisions contained in the convention be adopted;

(a) The service shall be effected by the delivery of the original or a copy of the document, as indicated in the request, and the copy of the translation, to the party or person to be served in person by an officer of the court;

(b) No court fees shall be charged in respect of the service. The particulars of charges of the officer employed to effect service shall be submitted to the taxing master of the Supreme Court who shall certify the amount properly payable in respect thereof;

(c) The Chief Justice shall transmit the consular or other authority making the request a certificate establishing the fact and the date of the service in person, or indicating the reasons for which it has not been possible to effect it, and at the same time shall notify to the said consular or other authority the amount of the charges certified under paragraph (b) hereof.

3. Upon the application of the Attorney General of the Federation with the consent of the Governor, the court or a judge may make all such orders for substituted service or otherwise as may be necessary to give effect to the preceding rules of this order.

ORDER XI

COMPUTATION OF TIME

1. Where by any Ordinance or any order or rule of court any special order, or other course of the court, any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, and such time is not limited by hours, the following rules shall apply;

(a) The limited time does not include the day of the date of or the happening of the event, but commences at the beginning of the day next following that day;

(b) The act or proceeding must be done or taken at latest on the last day of the limited time;

(c) Where the time limited is less than six days, the following days shall not be reckoned as part of the time namely, Sunday, Good Friday, Monday and Tuesday in Easter Week, Christmas Day and the day next before and next after Christmas day, and any public holiday;

(d) When the time expires on one of those days, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being one of those days.

2. The parties may not by consent enlarge or abridge any of the times fixed by these rules for taking any step, or filling any document, or giving any notice.

3. The court may, as often as it thinks fit, and either before or after the expiration of the time appointed by these rules, or by any judgment, order or rule of the court, extend or adjourn the time for doing any act or taking any proceeding.

ORDER XII

ATTENDANCE OF WITNESSES

1. In any proceedings, and at any stage thereof, the court may summon a person resident in Nigeria to give evidence, or to produce documents, or both, and the court may direct the cost thereof to be paid by the party to the proceedings in question if the court is of the opinion that such party ought to have called a witness, and to stay further proceedings until cost is paid or may order such witness to be summoned at the instance of the court without paying of fees or expenses, except in so far as the court may on the determination of the proceedings order that such fees or expenses be included in the cost to be paid by any party or parties.

2. Any person or persons present in court during the hearing of any proceedings may, if the court thinks fit be ordered to give evidence, or to produce documents.

3. if any person summoned or ordered as aforesaid fails to attend to give evidence, or to produce documents, or refuses to give evidence, or to produce documents, such failure or refusal shall, unless he excuses his failure or refusal to the satisfaction of the court, be treated as a contempt of court and be punishable either by fine, or imprisonment, or both, as the court shall deem fit.

4. it shall be lawful for the court to issue an order to bring up any person confined as a prisoner under any sentence or order of commitment for trial or otherwise, or under civil process to be examined as a witness in proceedings pending, or to be inquired of, in any court.

Provided that such order shall not be made as of course, nor unless the court shall forthwith obey such order by bringing the prisoner to the court in his custody, or by delivering him to an officer of the court, as the order may direct and if the prisoner shall under the terms of the order be delivered to any officer of the court, the officer in charge of the prison or other person shall not be liable for the escape of such prisoner.

5. Allowances to persons required to attend or be examined as witnesses for defraying their reasoning expenses and compensating them for their trouble and loss of time may, where ordered by the court, be made in accordance with the provision in part II of second Schedule under the heading

‘Allowances to Witnesses’

ORDER XIII

EVIDENCE

1. How Evidence to be taken

1. In the absence of any agreement between the parties, and subject to the provisions of the evidence ordinance and of these rules, the witnesses at the trial of any cause shall be examined *viva voce*, and in open court.

2. the court may, in any cause or matter where it shall appear necessary for the purpose of justice, make any order for the examination before any officer of the court, or other person, and at any place, of any witness or person and may order any deposition so taken to be filed in the court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any as the court may direct.

3. (1) If in any case the court shall so order, there shall be issued a request to examine witness resident out of the jurisdiction in lieu of a commission.

(2) Before any letter of request is issued, the solicitor or, if he be not represented by a solicitor, the party applying for such letter of request shall either file a written undertaking to be responsible for all expenses incurred by His Majesty's Secretary of State or by the Governor General in respect of the execution of the letter of request, and on receiving a notification of the amount of such expenses to pay the same to the accountant General of the Federation, or shall give security for the payment of such expenses in such other form as the Chief Justice may order.

(3) the letter of request shall be sealed with the seal of the Supreme Court and Signed by the Chief Justice, and shall be forwarded by him to the Governor General for Transmission to the tribunal therein named, through the diplomatic channel;

and when destined for a tribunal outside his Majesty's dominions it shall be accompanied by a list of questions to be put to witnesses respectively, together with a translation thereof, whenever practicable, into the language of the country to which the letter of request is directed.

4. Any judge or officer of court shall on the request in writing of any court before which a cause or matter is pending so take evidence for the purpose of the cause or matter.

5. The evidence, when not directed to be taken interrogatories previously settled, shall be taken as nearly as may be as evidence at the hearing of a suit; and then the note of the evidence shall be read over to the witness, and be signed by him. If he refuses, the judge shall add a note of his refusal, and the statement may be used as if he signed it.

6. Evidence may be taken in like manner on the application of any person before suit instituted, where it is shown to the satisfaction of the court on oath that the person applying has good reason to apprehend that a suit will be instituted against him in the court, and that some person within the jurisdiction at the of the application can give material evidence respecting the subject of the apprehended suit, but that he is about to leave the jurisdiction, or that from some other cause the person applying will lose the benefit of his evidence if it be not at once taken; and the evidence so taken may be used at the hearing, subject to just exceptions. Provided always that the court may impose any terms or conditions with reference to the examination of such witness and the admission of his evidence as to the court may seem reasonable.

7. Any party desiring to give in evidence any deed or other instrument, which shows upon the face of it that it has been duly executed, may deliver to the opposite party not less than four clear days before the return day a notice in writing specifying the date, nature and parties to such deed or instrument, and requiring the opposite party to admit that the

same was executed as it purports to have been, saving all just exceptions as to its admissibility, validity and contents; and if at or before the hearing of the suit the party so notified shall neglect or refuse to give such admission, the court may adjourn the hearing in order to enable the party tendering such deed or instrument to obtain proof of the due execution thereof, and upon production of such proof to be paid by the party so neglecting or refusing, whether he be the successful party or not.

2. Objections to Evidence

8. In every case, civil or criminal and at every stage thereof any objection to the reception of evidence by a party affected thereby shall be made at the time the evidence is offered: provided that an appeal court may in its discretion entertain any objection to evidence received in the court below, though not objected to at the time when it was tendered.

9. Where a question proposed to be put to a witness is objected to, the court, unless the objection appears frivolous shall take a note of the question and objection and mention on the notes whether the question was allowed to be put or not and the answer to it, if put.

10. Where a document is produced and tendered in evidence and rejection by the court, the document shall be marked as having been so tendered and rejected.

3. Obtaining Evidence for Foreign Tribunals

11. Where under the foreign Tribunals Evidence Act, 1856, or section 24 of the Extradition Act, 1870, any civil or commercial matter, or any criminal matter, is pending before a court or tribunal of a foreign country, and it is made to appear to the court by commission rogatoire, or letter of request, or other evidence as hereinafter provided, that such court or tribunal is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction,

the court may, on the ex parte application of any person shown to be duly authorized to make the application on behalf of such foreign court or tribunal, and on production of the commission rogatoire, or letter or request, or of a certificate signed in the manner, and certifying to the effect mentioned in section 2 of the Foreign Tribunals Evidence Act, 1856, or such order or orders as may be necessary to give effect to the intention of the acts above mentioned in conformity with section 1 of the said Foreign Tribunals Evidence Act, 1856.

12. The examination may be ordered to be taken before any fit and proper person nominated by the person applying, or before such other qualified person as to the court may seem fit.

13. Unless otherwise provided in the order for examination, the examiner before whom the examination is taken shall, on its completion, forward the same to the Chief Registrar of the Supreme Court, and on receipt thereof of the chief registrar shall append thereto a certificate duly sealed with the seal of the Supreme Court for use out of the jurisdiction, and shall return the depositions so certified, and the commission rogatoire, or letter of request, if any, to the foreign court or tribunal requiring the same, through the same channel as that through which the commission rogatoire, or letter of request was received.

14. An order made under rule 11 of this order may, if the court shall think fit, direct the said examination to be taken in such manner as may be requested by the commission rogatoire, or letter of request, from the foreign court, or therein signified to be in accordance with the practice or requirements of such court or tribunal, or which may for the same reason, be requested by the applicant for such order.

15. Rules 11 to 14 of this order shall apply, as far as may be, to applications under the evidence of commission Act, 1859, for the purpose of giving effect to any commission or

letter of request from any British tribunal out of the jurisdiction.

16. Where a commission rogatoire, or letter of request, as mentioned in rule 11 of this order, is transmitted to the Supreme Court by his Majesty's Secretary of State for the colonies with an intimation that it is desirable that effect should be given to the same without requiring an application to be made to the court by the agents in the jurisdiction of any of the parties to the action or matter in the foreign country, the Chief Registrar shall transmit the same to the Attorney General, who may thereupon make such applications and take such steps as may be necessary to give effect to such commission rogatoire, or letter of request, in accordance with rules 11 to 14 of his order.

4. Bankers' Book

17. On the application of any party to a legal proceeding, the court may order that such party be at liberty to inspect and take copies of any entries in a bankers' book for any of the purposes of such proceeding. An order under this rule may be made either with or without summoning the bank or any other party; and shall be served on the bank three days before the same is to be obeyed, unless the court otherwise directs.

18. The costs of any such application, and the costs of anything done or to be done under an order of the court made under or for the purpose of the foregoing rule, or under the provisions of section 96 of the Evidence Ordinance relating to the proof of an entry in a bankers' book, shall be in the discretion of the court, which may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank were a party to the cause or matter.

19. Expressions relating to banker's book include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

ORDER XIV

COSTS BETWEEN PARTY AND PARTY

1. In every suit the costs of the whole suit, and of each particular proceedings therein, and the costs of every proceeding in the court, shall be in the discretion of the court as regards the persons by whom they are to be paid.

2. The court shall not order the successful party in a suit to pay to the unsuccessful party the costs of the whole suit although the court may order the successful party, notwithstanding his success in the suit, to pay the costs of any particular proceeding therein.

3. The court may order any costs to be paid out of any fund or property to which a suit or proceeding relates.

4. When the court adjudges or orders any costs to be paid, the amount of such shall be, if practicable, summarily determined by the court at the time of making the judgment or order, and named therein.

5. In fixing the amount of costs, the principles to be observed in that the party who is in the right is to be indemnified for the expenses to which he has been necessarily put in establishing his claim, defence or counterclaim, but the court may take into account all the circumstances of the case.

6. In every civil case the court may, either of its own motion or on the application of any defendant, if it sees fit, require any plaintiff to any suit, either at the commencement or at any time during the progress thereof, to give security for costs to the satisfaction of the court, by deposit or otherwise, or to give further or better security, and may require any defendant to give security, or further or better security, for the costs of any particular proceeding undertaken in his

7. Where the court orders costs to be paid, or security to be given for costs by any party, the court may, if it thinks fit, order all proceedings by or on behalf of that party in the same suit or proceedings, or connected there with, to be stayed until the costs are paid or security given accordingly, but such order shall not supersede the use of any other lawful method of enforcing payment.

8. When the court deems it to be impracticable to determine summarily the amount of any costs which it has adjudged or ordered to be paid, all questions relating thereto may either be determined upon taxation by the court itself or may be referred by the court to a taxing officer and be ascertained by him and approved by the court.

9. Upon the taxation of costs the taxing officer may, in determining the remuneration to be allowed, have regard, subject to any rule of court, to the skill, labour and responsibility incurred.

10. In taxation of costs between party and party, nothing shall be allowed in respect of fees paid to the court beyond what was necessary having regard to the amount recovered on judgment.

11. If upon the taxation of any bill of costs more than one sixth is deducted from the amount claimed the court may either make no order as to the costs of the taxation or may order the party who filed the bill of cost to pay to the other party or parties the costs of the taxation.

12. Where a plaintiff is successful in any action which might have been brought by him in an inferior tribunal the court may take into account the smaller costs which would have been involved to the parties to the action if it had been taken in such inferior tribunal and may, in its discretion, grant the successful plaintiff modified costs or no costs and may grant to any other party such extra costs as the court is satisfied such other party has incurred by reason of the action being taken in the supreme court instead of in the Inferior Court,

unless the court is of opinion that the action was one which for some special reason it was proper to bring in the supreme court.

ORDER XV

APPEARANCE OF PARTIES

1. In every cause or matter pending before the court, in case it shall appear to the satisfaction of the court that any plaintiff or defendant who may not be represented by solicitor is prevented by some good or sufficient cause from attending the court in person, the court may in its discretion permit any master, servant, clerk, or member of the family, of such plaintiff or defendant, who shall satisfy the court that he has authority in that behalf, to appear for such plaintiff or defendant.

2. Any person doing any act or taking any proceeding in the court in the name or on behalf of another person, not being lawfully authorized thereunto, and knowing himself not to be so authorized, shall be deemed guilty of a contempt of court.

3. Where by the rules of court any act may be done any party in a suit, such act may be done either by the party in person, or by his solicitors or agent, if it can be legally done by an agent.

ORDER XVI

SOLICITORS

1. The Chief Justice may in his discretion admit to practice as a solicitor any person who satisfies the chief justice.

(a) That he is entitled to practice as a barrister or solicitor in England, Scotland, Northern Ireland or Eire, and

(b) That he is a person of good character.

2. Every person who shall desire to be admitted under the last proceeding rule shall deposit in the office of the registrar of the court, for custody therein, his certificate of call to the Bar, or of his admission as a solicitor, and shall file in the court an affidavit of his identity in such form as may be approved by the Chief Justice.

Provided always that the Chief Justice may, on special grounds and upon such terms as he may think reasonable exempt any such person from complying with the formalities prescribed by this rule, either absolutely or for any special period.

3. Every person admitted or licensed to practice within the jurisdiction of the court before the commencement of the Ordinance may continue to practice upon the terms and subject to the conditions of his admission or license.

4. (1) Where by virtue of the proviso to rule 2, the Chief Justice exempts a person from complying with its requirements for a specified period, the chief justice may grant him a temporary license to practice as a solicitor for a period of six months, and may also from time to time renew such license for one or more similar periods.

(2) Any such license may be revoked by the Chief Justice at any time.

5. Every person admitted to practice as a solicitor in the Supreme Court shall cause his name to be enrolled in a book. And to be kept for the purpose in the office of the Chief Registrar, and to be called the roll of the court; and no person whose name shall not be enrolled as aforesaid shall be entitled to practice.

Provided that this rule shall not preclude a person to whom a temporary license has been granted under rule 4 from practicing during the currency thereof.

6. Every solicitor admitted to practice under these rules shall be entitled to practice as both Barrister and solicitor and (subject to any rules of court for the time being in force) to sue for and recover his costs and shall be subjected to all such liabilities as attached by law to a solicitor in what- ever capacity his services may have been rendered.

7. And every person who has been granted a temporary license to practice shall be deemed to be an officer of the Supreme Court during the currency of his license.

8. Every person whose name shall be enrolled as aforesaid shall be deemed to be an officer of the Supreme Court.

9. (1) The Chief Registrar shall not on application grant a certificate of enrolment under the seal of the court to any person who has been enrolled as a solicitor pursuant to rule 5.

(2) The Chief Registrar shall whenever the chief Justice pursuant to rule

4 Grants a temporary license or renews the same, issue a certificate thereof under the seal of the court; and whenever any such licensed is revoked the Chief Registrar shall notify the renovation by notice under the said seal to the person affected thereby.

10. Any person who practices as a solicitor or prepare any document for reward (either direct or indirect) for use in relation to any cause or matter, without having been enrolled or licensed to practice as a solicitor, or after his name has been struck off the roll, or at any time during any period for which he has been suspended from practice, or at any time after his license has expired or has been revoked, shall be liable on summary conviction to a fine of 25 for every breach of this rule, without prejudice to any other punishment to which he may be liable under any other enactment.

11. Every solicitor who shall be engaged in any cause shall be bound to conduct the same on behalf of the plaintiff or defendant, as the case may be, for whom he shall have been so engaged, until final judgment, unless allowed by the court for

any special reason to cease acting therein but he shall not be bound, except under express agreement, or unless reengaged, to take any proceedings in relation to any appeal from such judgment.

12. Where it shall appear to the court that any cause has been commenced or carried on maliciously or without probable grounds, and the party by or on whose behalf such cause has been commenced or carried on has been represented therein by a solicitor, or if it shall appear that any solicitor has by any sort of deceit induced his client to enter into or continue any litigation, every such solicitor shall, on failure of his client to pay the amount thereof to the party ordered to pay, be liable to pay the amount thereof to the party to whom costs are given. Such failure shall be deemed to have taken place if the client shall have refused or neglected to make payment after a demand has been made on him, although no process of execution may have been used against him.

This rule shall not be construed to restrict the liability of any solicitor in respect of the abovementioned or any other misconduct for which he would otherwise be punishable.

12 (a) Where it appears to the court or a judge hearing a cause or matter or any application therein that the same cannot conveniently proceed by reason of the solicitor for any party having,

(a) Neglected to attend personally or by proper person on his behalf;

Or

(b) Omitted to take reasonable steps to secure the attendance of any witness, the nonattendance of whom is not attributable to any default or to misinformation on the part of the client; or

(c) Omitted to deliver any paper necessary for the use of the court and which according to the practice ought to have been delivered;

Such solicitor shall personally pay to all or any of the parties such costs as the court may think fit to award.

13. Whenever in any cause a solicitor shall be engaged only on one side, if the party not so represented shall be unsuccessful and costs be given against him, the successful party shall only be entitled to recover such costs between party and party as would have been recoverable by him if he had not employed a solicitor, unless the court shall certify that he ought also to recover solicitor's costs.

14. No solicitor shall be entitled to recover any costs in respect of any proceedings beyond the amount applicable to such proceedings which may be allowed by the authorized scale of fees, or in matters not therein included, which the court may allow on taxation, having regard to the skill, labour and responsibility involved.

15. Notwithstanding any authorized scale of fees it shall be lawful for any solicitor to enter into an agreement with a client to act for him and conduct his case in connection with any cause or proceeding in the court for an inclusive fee, which shall be of a reasonable amount, to cover all fees for his services as solicitor up to final judgment; provided that

(a) Every such agreement shall be in writing and signed by the practitioner and the client;

(b) No further agreement for remuneration in respect of the same cause or proceeding shall be entered into except with the leave of the chief justice or a judge;

(c) Any agreement under this rule shall be produced, if demanded, to the Chief Justice or a Judge, who may require the practitioner to satisfy him that the amount named is reasonable, having regard to the skill, labour and responsibility involved, and if not so satisfied, may reduce the agreed sum to such amount as appears to him to be reasonable and order the practitioner to refund to the client any moneys received by him in excess of such reduced amount;

(d) A copy, certified as correct under the hand of the practitioner, of every such agreement as aforesaid in relation to any cause or proceeding shall, where the agreed amount exceeds the sum of fifty pounds, be deposited with or sent by registered letter to the registrar of the judicial division wherein the cause or proceeding is or is to be instituted, within a week of the date on which such agreement is entered into.

16. Money paid into court may be paid to a solicitor if such solicitor produces a written authority from the person entitled to receive such money authorizing the solicitor to receive the same on his behalf.

Such written authority shall be retained by the officer making payment and shall be attached to the relative court receipt book.

17. (a) A solicitor who, in his professional capacity receives any money or property whatsoever shall give for such money or property a receipt to the person or persons from whom the said money or property is obtained.

(b) For the above mentioned purpose every practicing solicitor shall keep a counterfoil receipt book with folios consecutively numbered and shall specify both on the receipt to be given as aforesaid and on the counterfoil of such receipt the name of the person or persons from whom the said money or property is obtained, the consideration therefore, the amount thereof and the date of receipt.

(c) A solicitor shall produce such receipt book to the court or taxing officer when called upon so to do by the court or taxing officer.

18. Any agreement mentioned to secure to a solicitor any remuneration, or to constitute any conditions of his employment other than authorized by this and the following orders shall be null and void, and if a practitioner enters into

any such agreement, or receives any larger amount than authorized either directly or indirectly, or through any other person, for his use or benefits, he shall refund the whole amount of the overcharge, and shall be liable for a first offence to a fine, which may extend to double the amount of the overcharge or to twenty pounds, and for a subsequent offence to be suspended for such times as the court thinks fit, or to have his name struck off the roll.

19. Any solicitor who commits any breach of any of the said provisions of this Order or fails to comply with any of the said provisions for which breach or noncompliance no specific penalty is provided shall be liable for a first offence to a fine not exceeding twenty pounds, and for any subsequent offense to a fine not exceeding fifty pounds, without prejudice to the power of the court to suspend any solicitor or strike his name off the roll for professional misconduct.

ORDER XVII

SOLICITORS AND THE PREPARATION OF LEGAL DOCUMENTS

1. In this order, except where the context requires some other interpretation. ‘Conveyance’ means any instrument effecting the transfer of any real or personal property, or any estate or interest therein.

2. No solicitor shall endorse his name or cause it to be endorsed on any conveyance or on any document for use in any legal proceeding, unless the same be drafted and prepared by himself or by someone in his employment or under his control, upon the instructions of the parties concerned or any one or more of them.

3. No solicitor shall be entitled to recover any fee for drawing or preparing a conveyance beyond the amount which may be allowed by the authorized scale of fees or in matters

not therein included which the court may allow on taxation having regard to.

(a) The position of the party for whom the solicitor is concerned in any business, that is, whether as vendors or purchaser, lessor or lessee, mortgagor or mortgagee, and the like;

(b) The place, district and circumstances at or in which the business, or any part thereof, is transacted;

(c) The amount of the capital money or of the rent to which the business relates; and

(d) The skill, labour and responsibility involved therein on the part of the solicitor.

4. It shall be competent for a solicitor to make an agreement with his client, and for client to make an agreement with a solicitor, before the transaction of any Conveyancing business for the remuneration of the solicitor; and it shall be competent for the solicitor to accept from the client and for the client to give to the solicitor remuneration accordingly;

Provided that:

a) The agreement shall be in writing signed by the person to be charged therewith, or by his agent duly authorized in that behalf;

b) The agreement may, if the solicitor and the client think fit, be made on the terms that the amount of the remuneration therein stipulated for either shall include, or shall not include, all or any disbursement made by the solicitor in respect of searches, plans, traveling, stamps, fees, or other matters connected therewith;

c) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor, and if in any such suit or in any application to the court for an order for taxation of costs the solicitor shall rely upon any such agreement, and the client shall object thereto on

the ground that it is unfair and unreasonable, the court may order the taxing master or officer of the court to inquire into the facts and certify the same to the court; and if upon such certificate it shall appear to the court that just cause has been shown for cancelling the agreement, or for reducing the amount payable under the same, the court shall have power to order such cancellation or reduction and give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the court may seem fit;

d) No such agreement shall be made with an illiterate unless it be an agreement for the payment of a less amount than is authorized by the scale of fees or than may be found due on taxation.

ORDER XVIII

RECOVERY OF COSTS BY SOLICITORS

1. No solicitor shall commence any suit for the recovery of any fees, charges, or disbursements for or on account of any business done by him until the expiration of one month after he shall have delivered to the party to be charged therewith, either by serving the same personally, or by sending through the post by registered letter to, or by leaving at the office, place of business, dwelling house, or last known place of abode of, such party a bill of costs, signed by himself (or in case of a partnership by any of the partners either in his own name or in the name of the partnership) or enclosed in, or accompanied by, a letter signed in like manner and referring to such bill.

2. Upon application to the court either by the solicitor making the demand or by the party to be charged within such time as in the last preceding rule mentioned, the court shall either tax bill or refer the bill and the demand of the solicitor to be taxed and settled by the taxing officer of the court, and the

court shall restrain such solicitor from commencing any suit touching such demand pending such reference:

Provided that

(a) It shall be lawful for such taxation or reference as aforesaid to be made upon the application of either party at any time within six months from the date of the delivery of the bill, with such directions and subject to such conditions as to the court may seem just, and the court may restrain the solicitor from commencing or prosecuting any suit touching his demand pending such reference;

(b) No such taxation or reference as aforesaid shall be made after judgment shall have been obtained in any suit for the recovery of the demand of any solicitor, unless or until such judgment shall have been reversed or set aside, or, after the expiration of six months from the date of the delivery of the bill as aforesaid, except in special circumstances to be proved to the satisfaction of the court to which application shall be made.

3. Upon any taxation or reference as aforesaid, if either party refuses or neglects to attend the taxation after due notices the court or the taxing officer may proceed to tax and settle the bill *ex parte*.

4. In any reference as aforesaid the costs of taxation shall be paid according to the event (except as in rule 5 provided), that is to say, if such a bill when taxed be less by more than a sixth part than when presented for taxation, then the solicitor shall pay such costs, and in any other case the party to be charged shall pay such costs.

5. Every order to be made for any reference as aforesaid shall direct the taxing officer to certify what shall be found due to or from the solicitor in respect of the bill referred including the costs of the reference. Provided that the taxing officer may certify any special circumstances relating to the bill or

reference, and the court may make any order which it may think right respecting the costs of such reference.

6. In proving compliance with these rules, it shall not be necessary for any solicitor in the first instance to prove the contents of the bill of costs which he may have delivered, but it shall be sufficient to prove that a bill of costs was delivered in accordance with the provisions of this order.

7. Upon the completion of the taxation of any bill referred as aforesaid, the taxing officer shall submit for the approval of the court the result of his taxation, including costs, and the amount approved by the court shall be final and conclusive as to the amount to be recovered, provided that the court may in its discretion review any such approval; and it shall be lawful for the court to order that judgment be entered for the amount approved, unless the retainer is disputed, or to make such other order as the court may deem proper.

8. It shall be lawful for the court to make an order for the delivery by any solicitor of a bill of costs for business done by him; and the court shall have the same powers as the High Court of Justice in England with respect to making orders for the delivery up by a solicitor of any deeds, documents, or things in his possession, custody, or power belonging to a client.

9. All applications under this order shall be by motion in the matter of the solicitor concerned.

10. In this order 'solicitor' includes every person enrolled as a solicitor in the Supreme Court and the executor, administrator, or assignee of any such person.

11. In taxing any bill of costs under this order the court and the taxing officer shall be guided by the rules and fees set out in the Third Schedule hereto in so far as they apply to any items in such bill of costs.

ORDER XIX

ARREST OF ABSCONDING DEFENDANT

1. If in any suit for an amount or value of ten pounds or upwards the defendant is about to leave the jurisdiction of the court, or has disposed of or removed from the jurisdiction, his property, or any part thereof, or is about to do so, the plaintiff may either at the institution of the suit, or at any time thereafter until final judgment, make an application to the court that security be taken for the appearance of the defendant to answer any satisfy any judgment that may be passed against him in the suit.

2. If the court, after making such investigation as it may consider necessary, shall be opinion that there is probable cause for believing that the defendant is about to leave the jurisdiction of the court, or that he has disposed of or removed from the jurisdiction, his property, or any part thereof, or is about to do so, and that in either case by reason thereof the execution of any decree which may be made against him is likely to be obstructed or delayed, it shall be lawful for the court to issue a warrant to bring the defendant before the court, that he may show cause why he should not give good and sufficient bail for his appearance.

3. If the defendant fail to show such cause, the court shall order him to give bail for his appearance at any time when called upon while the suit is pending and until execution or satisfaction of any judgment that may be passed against him in the suit, or to give bail for the satisfaction of such judgment; and the surety and sureties shall undertake in default of such appearance or satisfaction to pay any sum of money that may be ad- judged against the defendant in the suit, with costs.

4. Should a defendant offer, in lieu of bail for his appearance, to deposit a sum of money, or other valuable

property, sufficient to answer the claim against him, with costs of the suit, the court may accept such deposit.

5. In the event of the defendant neither furnishing security nor offering a sufficient deposit, he may be committed to custody until the decision of the suit, or, if judgment be given against the defendant, until the execution of the decree, if the court shall so order.

Provided that the court may at any time, upon reasonable cause being shown and upon such terms as to security or otherwise as may seem just, release the defendant.

6. The application may be made to the Supreme Court in the judicial division in which the defendant may be, and such court may issue the warrant for detaining and bringing the defendant before the court, and may make such further order as shall seem just. In case the warrant shall be issued by a different court from that in which the suit is depending, such court shall, on the request of either of the parties, transmit the application and the evidence therein to the court in which the suit is so depending, and take sufficient security for the appearance of the defendant in that court, and the court in which the suit is depending shall thereupon examine into and proceed in the application in accordance with foregoing provisions, in such manner as it shall seem fit.

7. The expenses incurred for the subsistence in prison of the person so arrested shall be paid by the plaintiff in the action in advance, and the amount so disbursed may be recovered by the plaintiff in the suit, unless the court shall otherwise order. The court may release the person so imprisoned on failure by the plaintiff to pay the subsistence money, or in case of serious illness order his removal to hospital.

ORDER XX

INTERIM ATTACHMENT OF PROPERTY

1. (A) Where the defendant in any suit for an amount or value of ten pounds or upwards with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, or any part thereof, or to remove any such property from Nigeria; or

(b) Where, in any suit founded on contract or for detinue or trover in which the cause of action arose in Nigeria

(i) The defendant is absent from Nigeria, or there is probable cause to believe that he is concealing himself to evade service; and

(ii) The defendant is beneficially entitled to any property in Nigeria in the custody or under the control of any other person in Nigeria, or such person is indebted to the defendant;

Then in either such case the plaintiff may apply to the court either at the time of the institution of the suit or at any time thereafter until final judgment to call upon the defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and in his failing to give such security, to direct that any property movable or immovable belonging to the defendant shall be attached until the further order of the court.

2. The application shall contain a specification of the property required to be attached, and the estimated value thereof so far as the plaintiff shall, at the time of making the application, declare that to the best of his information and belief the defendant is about to dispose of or remove his property with such intent as aforesaid.

3. if the court, after making such investigation as it may consider necessary, shall be satisfied that the defendant is about to dispose of or remove his property with intent to obstruct or delay the execution of the decree, it shall be lawful for the court to order the defendant, within a time to be fixed by the

court, either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the court when required the said property, or the value of same, or such portion thereof as may be sufficient to fulfil the decree, or to appear and show cause why he should not furnish security. Pending the defendant compliance with such order, the court may by warrant direct the attachment until further order of the whole, or any portion, of the property specified in the application.

4. If the defendant fails to show such cause, or to furnish the required security within the time fixed by the court, the court may direct that the property specified in the application if not already attached, or such portion thereof as shall be sufficient to fulfil the decree, shall be attached until further order. If the defendant show such cause, or furnish the required security, and the property specified in the application, or any portion of it, shall have been attached, the court shall order the attachment to be withdrawn.

5. The attachment shall not affect the rights of the persons not parties to the suit, and in the event of any claim being preferred to the property attached before judgment, such claim shall be investigated in the manner prescribed for the investigation of claims to property attached in execution of a decree.

6. In all cases of attachment before judgment, the court shall at any time remove the same, on the defendant furnishing security as above required, together with security for the costs of the attachment, or upon an order for a non-suit striking out the cause or matter.

7. The application may be made to the supreme court in the judicial division where the defendant, or in case of urgency where the property proposed to be attached, may be, and such court may make such order as shall seem just. In case an order for the attachment of property shall be issued by a different court from that in which the suit is depending, such court shall,

on the request of either of the parties, transmit the application and evidence therein to the court in which the suit is so depending, retaining the property in the meantime under attachment or taking sufficient security for its value, and the court in which the suit is depending shall thereupon examine into and proceed in the application in accordance with the foregoing provisions, in such manner as shall seem just.

ORDER XXI

INJUNCTIONS, ETC.

1. In any suit in which it shall be shown to the satisfaction of the court that any property which is in dispute in the suit is in danger of being wasted, damaged, or alienated by any party to the suit, it shall be lawful for the court to issue an injunction to such party, commanding him to refrain from doing the particular act complained of, or to give such other order for the purpose of staying and preventing him from wasting, damaging or alienating the property, as to the court may seem fit and in all cases in which it may appear to the court to be necessary for the preservation, or the better management or custody of any property which is in dispute in a suit, it shall be lawful for the court to appoint a receiver or manager of such property, and if need be to remove the person in whose possession or custody the property may be from the possession or custody thereof, and to commit the same to the custody of such receiver or manager, and to grant to such receiver or manager all such powers for the management or the preservation and improvement of the property and the collection of the rents and profits thereof, and the application and disposal of such rents and profits, as to the court may seem proper.

2. It shall be lawful for the court, on the application of any party to a suit, to make any order for the sale by any person named in such order, and in such manner and on such terms as

to the court may seem desirable, of any goods, wares, or merchandise, the right to which is in dispute in the suit, which may be of a perishable nature, or likely to injure from keeping or which for any other just and sufficient reason it may be desirable to have sold at once.

3. it shall be lawful for the court, upon the application of any party to a suit, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property being the subject of such suit, and for all or any of the purposes aforesaid, to authorize any person or persons to enter upon or into any land or building in the possession of any party to such suit; and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observations to be made or experiment to be tried which may seem necessary or expedient for the purpose of obtaining full information or evidence.

4. In any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same be accompanied by any claim for damages or not, it shall be lawful for the plaintiff at any time after the commencement of the suit, and whether before or after judgment, to apply to the court for an injunction to restrain the defendant from the repetition or the continuance of the breach of contract or wrongful act complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract. Or relating to the same property or right, and such injunction may be granted by the court on such terms as to the duration of the injunction, keeping an account, giving security or otherwise as to the court shall seem reasonable and just.

Provided always, that any order for an injunction may be discharged or varied, or set aside by the court, on application made thereto by any part dissatisfied with such order.

5. The court may, in every case, before granting an injunction or order as aforesaid, direct such reasonable notice of the application for the same to be given to the opposite party as it shall see fit.

ORDER XXIII

REPARATION FOR NEEDLESS ARRESTS, ETC.

1. The court upon making any order to hold to bail, or of sale, injunction or attachment, or any warrant to stop the clearance of, or to arrest any ship as aforesaid, may impose such terms and conditions as the court shall deem just, and in particular it may require the person applying for any such order to enter into such security as the court considers requisite for his being answerable in any damages that may accrue through such order or warrant.

2. In any case in which such order as aforesaid shall have been made-

(a) If it shall afterwards appear to the court that the arrest of any defendant, or any order of attachment, sale, or injunction, or any warrant to stop the clearance of, or to arrest any ship, was applied for on insufficient grounds; or

(b) If the suit in which any such application was made is dismissed, or judgment is given against the plaintiff by default or otherwise, and it shall appear to the court that there was no probable ground for instituting such suit,

The court may (on the application of the defendant made at any time before the expiration of six months from the termination of the suit) award against the plaintiff such amount, not exceeding the sum of two hundred pounds, as it may deem a reasonable compensation to the defendant for any loss, injury, or expense which he may have sustained by reason of such arrest, attachment, order of sale or injunction, as aforesaid: Provided that the court shall not award a larger

amount of compensation under this rule than such court is competent to decree in an action for damages.

3. The provisions of the preceding rules shall not take away any right of action or other right which would otherwise have existed: but no action shall be commenced or continued in respect of the same grounds on which the court may have made an award of compensation.

ORDER XXIV

RELIEF FROM ADVERSE CLAIMS

1. Where in any suit the defendant claims no interest in the money claimed, or other subject matter thereof, but the right thereto is claimed by or supposed to belong to a third party and the defendant is ready to bring into court, or to pay or dispose of the subject matter of the suit as the court shall order, it shall be lawful for the court, on the application of the defendant, and on being satisfied that there is no collusion between him and such third party, to order such third party to appear before the court to state the nature of his claim, and to maintain or relinquish the same, and if he maintain it the court may order him to be made a defendant in the suit, in lieu of, or in addition to, the original defendant.

2. In any case in which such order as aforesaid shall have been made-

(a) If it shall afterward appear to the court that the arrest of any defendant, or any order of attachment, sale, or injunction, or any warrant to stop the clearance of, or to arrest any ship, was applied for on insufficient grounds; or

(b) If the suit in which any such application was made is dismissed, or judgment is given against the plaintiff by default or otherwise, and it shall appear to the court that there was no probable ground for instituting such suit,

The court may (on the application of the defendant made at any time before the expiration of six months from the

termination of the suit) award against the plaintiff such amount, not exceeding the sum of two hundred pounds, as it may deem a reasonable compensation to the defendant for any loss, injury or expenses which he may have sustained by reason of such arrest, attachment, order of sale or injunction, as aforesaid.

Provided that the court shall not award a larger amount of compensation under this rule than such court is competent to decree in an action for damages.

3. The provisions of the proceeding rule shall not take away any right of action or other right which would otherwise have existed: but no action shall be commenced or continued in respect of the same grounds on which the court may have made an award of compensation.

ORDER XXIV

RELIEF FROM ADVERSE CLAIMS

1. Where in any suit the defendant claims no interest in the money claimed, or other subject matter thereof, but the right thereto is claimed by or sup-posed to belong to a third party, and the defendant is ready to bring into court, or to pay or dispose of the subject matter of the suit as the court shall order, it shall be lawful for the court, on the application of the defendant, and on being satisfied that there is no collusion between him and such third party, to order such third party to appear before the court to state the nature of his claim, and to maintain or relinquish the same, and if he maintain it the court may order him to be made a defendant in the suit, in lieu of or in addition to the original defendant.

2. The sheriff may obtain relief under this rule, if the adverse claimants have given him notice of their claims, though none of them may have commenced proceedings.

3. Where actions is brought to recover, or a defendant in his defence seeks by way of counterclaim to recover, specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien, or otherwise, as security for any sum of money, the court may order that the party claiming to recover the property be at liberty to pay into court to abide the event of the action the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as the court may direct, and that upon such payment into court being made, the property claimed be given up to the party claiming it.

ORDER XXV TENDER

A defence, alleging tender by the defendant, must be accompanied by payment into court of the amount alleged to have been tendered.

ORDER XXVI EQUITABLE RELIEF, COUNTERCLAIM, SETOFF

1. Every suit implies an offer to do equity in the matter thereof and admits of any equitable defence.

2. The plaintiff may obtain any such equitable relief as the facts stated and proved entitled him to, though not specifically asked.

3. A defendant in an action may set off, or set up, by way of counterclaim, against the claims of the plaintiff, any right or claim whether such set off or counterclaim shall have the same effect as a statement of claim in a cross action, so as to enable the court to pronounce a final judgment in the same action,

both on the original and on the cross claim. But the court may if in the opinion of the court such setoff or counterclaim cannot to be allowed, refuse permission to the defendant to avail himself thereof.

4. (a) No defendant shall be allowed to set up any such counterclaim or setoff unless he shall have lodged with the registrar four clear days before the return day a notice in original, and as many duplicates thereof as there are plaintiffs containing his name and address and a concise statement of the grounds of such counterclaim or setoff, and shall have paid the same court and service fees as would be payable if he were claiming by writ of summons.

Provided that the court may in its discretion, and such terms as may seem just, allow the defendant to set up a counter claim or set off notwithstanding that such notice has not been duly lodged.

(b) On receipt of notice of counterclaim or set-off, and on due payment of the fees, the registrar shall cause a duplicate of such notice to be served on the plaintiff, or each of them.

(c) The provisions of order III as to particulars of claim shall apply, as far as they are applicable, to counterclaim and setoff.

5. Where in any action a setoff of counterclaim is established, as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

6. The court, if it sees fit, may order that a defence or partial setoff shall be accompanied by payment into court of the amount to which, on the defendant's showing, the plaintiff is entitled, unless the plaintiff's claim to that amount is resisted on some other ground of defence; and in default of such payment the defendant shall be liable to bear the costs of the

suit, even if he succeeded in his defence to the extent of the set-off on which he relies.

ORDER XXVII

PAYMENT INTO COURT

1. Payment into court shall be accompanied by a defence in writing or reduced into writing. The defence must state that the money is paid in satisfaction of the plaintiff's claim generally or (as the case may be) in satisfaction of some specific part of the plaintiff's claim, where the claim is stated in respect of distinct matters.

2. Payment into court whether made in satisfaction of the plaintiff's claim generally or in satisfaction of some specific part thereof, operates, unless the defendant in his defence denies liability, as an admission of liability to the extent of the amount paid in, and no more, and for no other purpose.

When money is paid into court with a defence denying liability it shall be subject to the provisions of rule 5.

3. Where the defendant pays money into court, and the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into court is made is not denied in the defence, the plaintiff shall be at liberty to accept the same in full satisfaction and discharge of the cause of suit in respect of which it is paid in, and in that case the plaintiff may forthwith apply by motion for payment of the money out of court to him; and, on hearing the motion, the court shall make such order as to stay of further proceedings in suit, in whole or in part, and as to costs and other matters, as seems just.

4. If the plaintiff does not so apply, he shall be considered as insisting that he has sustained damages to a greater amount, or (as the case may be) that the defendant was and is indebted to him in a greater amount than the sum paid in; and in that case the court, in determining the suit and disposing of costs at

the hearing, shall have regard to the fact of the payment into court having been made and not accepted.

5. When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the answer, the following rules shall apply:

(a) the plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided, notwithstanding the defendants denial of liability, whereupon all further proceedings in respect of such claim or cause or cause of action except as to costs, shall be stayed; or the plaintiff may refuse to accept the money in satisfaction, in which case the money shall remain in court subject to the visions hereinafter mentioned.

(b) If the plaintiff accepts the money so paid in, he shall be entitled, with the leave of the court, to have the money paid out to him.

(c) If the plaintiff does not accept, in satisfaction of the claim or cause or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action or any part thereof, the money shall remain in court and be subject to the order of the court or a judge and shall not be paid out of court except in pursuance of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into the court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action the whole amount shall under such order, be repaid to him.

6. Where any money is required to be paid or deposited in court, the court may, if it shall think it expedient, address a request in writing to the treasurer for the district where such court is held, calling upon him to receive such moneys, and the treasurer shall thereupon receive the same, and shall pay or deliver such money to such person as may be directed by an order of the court to receive the same.

Such treasurer, duly observing any direction which shall receive from the court respecting such money, shall be free and exonerated from all liability in respect thereof.

7. A plaintiff may, in answer to a counterclaim, pay money into court in satisfaction thereof subject to the like conditions as to costs and otherwise as upon payment into court by a defendant.

8. Money paid into court under an order of the court or a judge shall not be paid out except in pursuance of an order of the court or a judge.

ORDER XXVIII

DISMISSAL OF SUIT ON GROUNDS OF LAW

1. Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him.

2. For the purpose of such application, the defendant shall be taken as admitting the truth of the plaintiff's allegations and no evidence respecting matters of fact, and no discussions of questions of fact shall be allowed.

3. The court, on hearing the application, shall either dismiss the suit or order the defendants to answer the plaintiff's against the fact, and shall make such order as to costs as shall be just.

ORDER XXIX INTERROGATORIES; DISCOVERY AND PRODUCTION OF DOCUMENTS

1. Any party may, by leave of the court (but if he is required to deliver any pleading, not until he has delivered a sufficient pleading), deliver interrogatories in writing for the examination of the opposite party upon any matter as to which discovery may be sought.

2. The court may strike out or permit to be amended any interrogatory which, in the opinion of the court, is scandalous or irrelevant, or not put bona fide for the purposes of the action, or not sufficiently material, or in any other way objectionable.

3. The party interrogated shall answer the interrogatories subject to just exceptions.

4. If any party interrogated omits to answer or answers insufficiently, without just cause, the party interrogating may apply to the court for an order requiring him to answer or to answer further. Thereupon, or upon the court's own motion, if the court thinks fit, an order may be made requiring him to answer, or to answer further, either by affidavit or by viva voce examination, as the court may direct.

5. The court may order any party to the suit to make discovery upon oath of the documents, which are or have been in his possession or power, relating to any matter in question in the suit.

6. The court may at any time during the pendency therein of any suit or proceeding, order the production by any party thereto, upon oath, of any documents in such suit or proceeding, and the court may deal with such documents when produced as shall appear just.

7. The court may in its discretion, on the application of any of the parties to any suit or proceeding, compel any other party to allow the applicant to inspect all or any documents in the custody or under the control of such other party relative to

such suit, and, if necessary, to take examined copies of the same.

8. Whenever any of the parties to a suit is desirous that any document or other thing which he believes to be in the possession or power of the other parties thereto, or of any other person, should be produced at any hearing of the suit, he shall at the earliest opportunity serve the party, in whose possession or power he believes the document or other thing to be, with a notice in writing calling upon him to produce the same.

9. In case it shall appear to the court that there is reasonable ground to believe that such document or thing will not be produced pursuant to such notice, the court may make an order for the production of the same at the hearing of the suit, by the party served with the notice, subject to just exceptions.

10. If the party from whom discovery of any kind, or production or inspection, is sought, objects to the same, or any part thereof, the court, if satisfied that the right to the discovery or production or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

11. If any party fails to comply with an order to answer interrogatories, or for discovery or production or inspection of documents, he shall be liable to commitment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and if a defendant, to have his defence, if any struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court for an order to that effect, and an order may be made accordingly.

ORDER XXX ADMISSIONS

1. Any party to a suit may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the writ of summons, statement of claim, defence or other statement of any other party.

2. Any party may, by leave of the court, call upon any other party, by notice filed in court and served under order of the court, to admit any document or fact, saving just exceptions, and on granting such leave the court shall fix the terms and conditions thereof, including the time within which the admission are to be made.

3. In case of neglect or refusal to admit, the costs of proof of the document or fact shall be paid by the party neglecting or refusing to admit, whatever be the result of the cause, unless the court is of opinion that the neglect or refusal to admit was reasonable.

4. If the plaintiff and defendant shall agree as to the terms and conditions on which judgment shall be entered, and shall sign a statement of such terms and conditions, the court unless it sees good reason to the contrary, shall enter judgment on the terms and conditions specified in such statement.

5. If any defendant shall in like manner as in the preceding rule mentioned sign a statement admitting the claim, or any part thereof, the court may receive such statement in evidence as an admission without further proof.

ORDER XXXI SETTLEMENT OF ISSUES

1. At any time before or at the hearing, the court may, if it thinks fit, on the application of any party, or of its own motion, proceed to ascertain and determine what are the material

questions in controversy between the parties, and may reduce such questions into writing and settle them in the form of issues, which issues when settled may state questions of law on admitted facts or questions of disputed facts, or questions partly of the one kind and partly of the other.

2. The court may, if it thinks fit, direct the parties to prepare such issues, and the same shall be settled by the court.

3. The issues may be settled without any previous notice at any stage of the proceedings, at which all the parties are actually present, or at the hearing. If otherwise, notice shall be given to the parties to attend at the settlement of the issues.

4. At any time before the decision of the case, if it shall appear to the court necessary for the purpose of determining the real question or controversy between the parties, the court may amend the issues or frame additional issues on such terms as to it shall seem fit.

ORDER XXXII

PLEADINGS

1. In all suits written pleadings shall be ordered by the court unless the court considers in any particular suit that written pleadings are unnecessary.

2. In making any such order, the court shall have regard to the condition of the parties, and shall not require any party to file a written statement who, from want of education, is incapable of preparing or understanding the same. If in any case the court considers it necessary, in the interest of justice, that any statement of such party should be reduced into writing previous to the hearing, the court may direct that the same be taken down in writing by the registrar or other fit officer of the court and, after verifying the statement so prepared by oral examination of the party where necessary, may direct, if it thinks fit, that such statement be filed as a pleading.

3. When the court for any reason decided not to order written pleadings the court, either itself or by the registrar, shall at or before the trial take from each party, or from the barrister or solicitor of each party, and record, a short statement of the facts and pleas upon which such party relies sufficiently definite and detailed to enable the court and the parties to know as far as possible at the outset of the trial the issues of facts and law which falls to be decided at the trial. Such records shall be read over by the court to the parties as soon as made and shall thereupon bind the parties to the same effect as if such record were pleadings filed under this order.

4. Wherever any pleading, statement of claim, or defence is ordered to be filed the provisions of the following rules shall be observed

5. Every pleading shall contain a statement of all the material facts, on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraph numbered consecutively, and each paragraph containing as nearly as may be a separate allegation.

6. The facts shall be alleged positively, precisely and distinctly, and as briefly as is consistent with a clear statement.

7. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief, and the same rule shall apply to any counterclaim made or relief claimed by the defendant in his defence.

8. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of set – off or counterclaim founded upon separate and distinct facts.

9. The defendant's pleading or defence shall deny all such material allegations in the petition as the defendant intends to deny at the hearing. Every allegation of fact, if not denied

specifically or by necessary implication, or stated to be not admitted, shall be taken as established at the hearing.

10. It shall not be sufficient to deny generally the facts alleged by the statement of claim, but the defendant must deal specifically therewith, either admitting or denying the truth of each allegation of fact *seriatim*, as the truth or falsehood of each is within his knowledge, or (as the case may be) stating that he does not know whether such allegation or allegations is or are true or otherwise.

11. When a party denies an allegation of fact he must not do so evasively, but answer the point of substance. And when a matter of facts is alleged with diverse circumstances it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

12. The defence shall admit such material allegations in the statement of claim as the defendant knows to be true, or desires to be taken as admitted, and such allegations may be taken as established without proof thereof.

13. The defence must allege facts not stated in the statement of claim on which the defendant relies on defence, as establishing, for instance, fraud on the part of the plaintiff, or showing that the plaintiff's right to recover or to any relief capable of being granted on the petition, has not yet accrued, or is released, or barred, or otherwise gone.

14. Where any defendant seeks to rely upon any facts, as supporting a right of setoff or counterclaim, he shall, in his statement of defence, state specifically that he does so by way of setoff or counter claim, and the particulars of such setoff or counterclaim shall be given.

15. The defence of a defendant shall not debar him at the hearing from disproving any allegation of the plaintiff not admitted by the defence, or from giving evidence in support of a defence not expressly setup by the defence, except where the defence is such as, in the opinion of the court, ought to have been expressly set up by the defence, or is inconsistent with the

statements thereof, or is, in the opinion of the court, likely to take the plaintiff by surprise and to raise new issues not fairly arising out of the pleadings, as they stand, and such as the plaintiff ought not to be then called upon to try.

16. The court if it considers that the statements of claim and defence filed in any suit insufficiently disclose and fix the real issues between the parties may order such further pleadings to be filed as it may deem necessary for the purpose of bringing the parties to an issue.

17. Where the court shall be of opinion that any allegation of fact, denied or not admitted by any pleading, ought to have been admitted, the court shall make such order as may be just with respect to costs.

18. Every pleading shall be filed at such times as the court directs, and be served on the opposite party or his solicitor, if the court thinks fit, at such time and in such manner as it directs.

19. The court may at any time, on the application of either party, strike out any pleading or any part thereof, on the ground that it discloses no cause of action, or no defence to the action as the case may be, or on the ground that it is embarrassing, or scandalous, or vexatious, or an abuse of the process of the court, and the court may either give leave to amend such pleading, or may proceed to give judgment for the plaintiff or defendant, as the case may be, or may make such other order, and upon such terms and conditions, as may seem just.

ORDER XXXIII

AMENDMENT OF PROCEEDING

The court may at any stage of the proceedings, either of its own motion or on the application of either party, order any proceeding to be amended, whether the defects or error be that of the party applying to amend or not; and all such

amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the fair trial of the suit, and for the purpose of determining in the existing suit the real questions or question in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or other- wise as shall seem just.

ORDER XXXIV

INTERLOCUTORY APPLICATIONS

1. Interlocutory applications may be made by motion at any stage of a cause or matter.

2. Unless the court shall otherwise order, no motion shall be entertained until the party moving has filed a motion paper or made verbal application to the registrar, distinctly stating the terms of the order sought.

3. The registrar shall make up, for each day on which the court appoints motion to be heard, a motion list, on which he shall enter the names of each cause in which a motion is made, the party moving and the terms of the order sought by him.

4. There shall be filed with the motion paper all affidavits on which the person moving intends to rely.

5. The motion shall be made on such days and at such times as are by the regulations of the court appointed for hearing motion. In cases of urgency the motion may, by leave of the court, be made at any time while the court is sitting.

6. The hearing of any motion may from time to time be adjourned upon such terms as the court may deem fit.

7. Motion may be made either *ex parte* or after notice to the parties to be affected thereby.

2. Ex parte motions

8. On a motion ex parte the party moving shall apply for either an immediate absolute order of the court, in the terms of the motion paper, on his own showing and evidence, or an order on the other party to appear on a certain day and show cause why an order should not be made in terms of the motion paper.

9. Any party moving in court ex parte may support his motion by argument addressed to the court on the facts put in evidence; and no party to the suit or proceeding, although present, other than the party moving, shall be entitled to be then heard.

10. Where a motion is made ex parte, the court may refuse to make the order sought, or may grant an order to show cause why the order sought should not be made, or made, or may allow the motion to be made on notice to the parties to be affected thereby.

11. Where an order is made on a motion ex parte, any party affected by it may, within seven days after service of it, or within such further time as the court shall allow, apply to the court motion to vary or discharge it; and the court', on notice to the party obtaining the order, either may refuse to vary or discharge it, or may vary or discharge it with or without imposing terms as to costs or security, or otherwise as seems just.

3. Orders to show cause

12. An order to show cause shall specify a day when cause is to be shown, to be called the return day to the order, which shall ordinarily be not less than three days after service.

13. A person served with an order to show cause may before the return day, produce evidence to contradict the evidence used in obtaining the order, or setting forth other

facts on which he relies to induce the court to discharge or vary such order.

14. On the return day, if the person served do not appear and it appears to the court that the service on all proper parties has not been duly effected, the court may enlarge the time and direct further service or make such other as seems just.

15. If the person served appears, or the court is satisfied that service has been dully effected the court may proceed with the matter.

16. The court may either discharge the order or make the same absolute, or adjourn the consideration thereof, or permit further evidence to be produced in support of or against the order, and may modify the terms of the order so as to meet the merits of the case.

4. Notice of Motion

17. Unless the court gives special leave to the contrary there shall be at least two clear days between the service of a notice of motion and the day named in the notice for hearing he motion.

18. Notice of motion may, without leave of the court, be served by any person; notwithstanding that such person is not an officer of the court.

19. Where a party acts by a solicitor, service of notice of motion on such solicitor shall be deemed good service on such party.

20. Along with the notice of motion there shall be served a copy of any affidavit on which the party moving intends to rely at the hearing of such motion.

21. If at the hearing of any motion the court shall be of opinion that any person, to whom notice has been given, ought to have or to have had such notice, the court may either dismiss the motion or adjourn the hearing thereof in order that such notice may be given, upon such terms as to the court may seem fit.

22. The plaintiff may, by leave of the court, cause any notice of motion to be served upon any defendant with the writ of summons.

5. Evidence in Interlocutory Proceedings

23. Oral evidence shall not be heard in support of any motion unless by leave of the court, where the party moving is illiterate, the court may direct evidence to be taken by the registrar, or other fit officer of the court, and the minutes of such evidence may be used as an affidavit.

24. In addition to or in lieu of affidavits the court may, if it thinks it expedient, examine any witness viva voce, or receive documents in evidence, and may summon any person to attend to produce documents before it, or to be examined or cross examined before it in like manner as at the hearing of a suit.

25. Such notice as the court in each case, according to the persons summoned, and to such persons (parties to the cause or matter or otherwise interested) as the court considers entitled to inspect the documents to be produced, or to examine the person summoned, or to be present at his examination, as the case may be.

26. The evidence of a witness on any such examination shall be taken in like manner as nearly as may be at the hearing of a suit.

27. Upon the hearing of any motion the court may, on such terms as it may deem fit, allow any affidavit to be used, although such affidavit has not been filed with the motion paper, and although a copy thereof has been served on the opposite side along with the notice of motion.

ORDER XXXV

ALTERATION OF PARTIES

1. (1) Where after the institution of a suit any change or transmission of interest or liability occurs in relation to any party to the suit, or any party to the suit dies or becomes incapable of carrying on the suit, or the suit in any other way becomes defective or incapable of being carried on, any person interested may obtain from the court any order requisite for curing the defect, or enabling or compelling proper parties to carry on the proceedings.

(2) But any person served with such an order may, within such time as the court in the order directs, apply to the court to discharge or vary the order.

2. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives.

3. If there be two or more plaintiffs or defendants, and one of them die, and if the cause of action survive to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, and against the surviving defendant or defendants.

4. If there be two or more plaintiffs and one of them die, and if the cause of action shall not survive to the surviving plaintiff or plaintiffs alone, but shall survive to them and the legal representative of the deceased plaintiff jointly, the court may, on the application of the legal representative of the deceased plaintiff, enter the name of such representative in the suit in the place of such deceased plaintiff, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs and such legal representative of the deceased plaintiff. If not application shall be made to the court by any person claiming to be the legal representative of the deceased plaintiff the suit shall proceed at the instance of the surviving plaintiff or

plaintiff; and the legal representative of the deceased plaintiff shall, after notice to appear, be interested in, and shall be bound by the judgment given in the suit, in the same manner as if the suit had proceeded at his instance conjointly with the surviving plaintiff or plaintiffs, unless the court shall see cause to direct otherwise.

5. In case of the death of a sole plaintiff, or sole surviving plaintiff, the court may, on the application of the legal representative of such plaintiff, enter the name of such representative in the place of such plaintiff in the suit, and the suit shall thereupon proceed; if no such application shall be made to the court within what it may consider a reasonable time by any person claiming to be the legal representative of the deceased sole plaintiff or sole surviving plaintiff, it shall be competent for the court to make an order that the suit shall abate, and to award to the defendant the reasonable costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased sole plaintiff or surviving plaintiff; or the court may, if it thinks proper, on the application of the defendant and upon such terms as to costs as may seem fit, make such order for bringing in the legal representative of the deceased sole plaintiff or surviving plaintiff, and for proceeding with the suit to a final determination of the matters in dispute, as may appear just and proper in the circumstances of the case.

6. If any dispute arise as to who is the legal representative of a deceased plaintiff, it shall be competent to the court either to stay the suit until the fact has been duly determined in another suit, or to decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

7. If there be two or more defendants, and one of them die, and the cause of action shall not survive against the surviving defendant or defendants alone, and also in the case of the death of a sole defendant, or sole surviving defendant, where

the action survives, the plaintiff may make an application to the court, specifying the name, description and place of abode of any person whom the plaintiff alleges to be the legal representative of such defendant and whom he desires to be made the defendant in his stead; and the court shall thereupon enter the name of such representative in the suit in the place of such defendant, and shall issue an order to him to appear on a day to be therein mentioned to defend the suit; and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant, and had been a party to the former proceedings in the suit.

8. The bankruptcy of the plaintiff, in any suit which the assignee or trustee might maintain for the benefit of the creditors, shall not be a valid objection to the continuance of such suit, unless the assignee or trustee shall decline to continue the suit, and to give security for the costs thereof, within such reasonable times as the court may order; if the assignee or trustee neglect or refuse to continue the suit and to give such security within the time limited by the order, the defendant may, within eight days after such neglects or refusal, plead the bankruptcy of the plaintiff as a reason for abating the suit.

ORDER XXXVI

ENTRY OF CAUSES FOR HEARING

1. It shall not be necessary for the defendant to enter a formal appearance, but on the return day marked on the writ of summons (the summons having been served) the cause shall be placed by the registrar on the cause list.

2. Causes shall be placed on the cause list in the order of the date of the issue of their respective writs of summons.

3. Causes shall be taken for hearing in the order in which they stand on the cause list:

Provided that the court may direct any cause to be heard out of its ordinary turn.

4. Any cause on the list not disposed of may be adjourned to a future day and to the same or another place. Any causes not so adjourned shall be placed on the cause list at the next sitting of the court in the same order as they stood on the previous cause list. No further notice to either party of any such adjournment or of any cause being placed on the cause list of the next sitting of the court shall be requisite, unless otherwise ordered by the court.

5. In case the judge shall fail to attend the court on the day on which any cause is fixed for hearing such cause stand adjourned sine die or to such definite date as the registrar may announce to the parties.

ORDER XXXVII

POSTPONEMENT OF HEARING

1. The court may postpone the hearing of any cause on being satisfied that the postponement is likely to have the effect of better ensuring the hearing and determination of the questions between the parties on the merits, and is not made for the purpose of mere delay. The postponement may be made on such terms as to the court seem just.

2. Where such application is made on the ground of the absence of a witness, the court shall require to be satisfied that his evidence is material, and that he is likely to return and give evidence within a reasonable time.

3. Where an application is made for the purpose of enabling the party applying to obtain the evidence of a witness resident out of the jurisdiction, the court shall require to be satisfied that the evidence of the witness is material, and that he is permanently residing out of the jurisdiction, or does not intend to come within the jurisdiction within a reasonable time.

ORDER XXXVIII

SITTING OF COURT

1. Subject to the provision of the ordinance, the court may, at its discretion, appoint any day or days, and any place or places from time to time, for the hearing of causes as circumstances require.

2. Subject to special arrangements for any particular day the business of the court shall be taken as nearly as circumstances permit in the following order:

- a) Ex parte Motion;
 - b) Motions on notice and arguments on showing cause;
 - c) Judgment summonses;
 - d) Interpleader issues;
 - f) Causes in the order in which they appear in the cause list,
- unless the

Court sees fit to vary the order.

ORDER XXXIX

TRIAL

1. The trial of every suit shall take place before the court, and the court questions of fact or of law, and partly of fact and partly of law, arising in such suit.

2. If the court considers it conducive to justice, it may direct that any one or more issues of fact or law arising in any suit may be tried before any other issue or issues.

ORDER XL
NON – ATTENDANCE OF PARTIES AT
HEARING

1. Where a cause on the cause list has been called, if neither party appears the court shall, unless it sees good reason to the contrary, strike cause out of the cause list.

2. If the plaintiff does not appear the court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counterclaim by the defendant) and make such order as to costs in favour of any defendant appearing as seems just:

Provided that if the defendant shall admit the cause of action to the full amount claimed, the court may, if it thinks fit, give judgment as if the plaintiff had appeared.

3. If the plaintiff appears and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.

4. Where the defendant to a cause which has been struck out under rule 2 of this order has a counter claim the court may, on due proof of service on the plaintiff of notice thereof, proceed to hear the counterclaim and give judgment on the evidence adduced by the defendant, or may postpone the hearing of the counterclaim and direct notice of such postponement to be given to the plaintiff.

5. Any judgment obtained against any party in the absence of such party may sufficiently cause shown be set aside by the court upon such term as may seem fit.

6. Any cause struck out may, by leave of the court, be replaced on the cause list on such terms as to the court may seem fit.

ORDER XLI

PROCEEDINGS AT THE HEARING

1. The order of proceeding at the hearing of a cause, in cases in which statements of claim and of defence have been filed, shall be as follows.

2. The party, on whom the burden of proof is thrown by the nature of the material issues or questions between the parties, according as the court may determine, shall begin. He shall state his case.

3. He shall then produce his evidence and examine his witnesses in chief.

4. When the party beginning has concluded his evidence, he shall ask the other party if he intends to call evidence (in which term is concluded evidence taken by affidavit or deposition, or under commission, and documentary evidence not already read or taken as read); and if answered in the negative he shall be entitled to sum up the evidence already given, and comment thereon; but if answered in the affirmative he shall wait for his general reply.

5. When the party beginning has concluded his case, the other party shall be at liberty to state his case and to call evidence, and to sum up and comment thereon.

6. If no evidence is called or read by the latter party, the party beginning shall have no right to reply, unless he has been prevented from summing up his case by the statement of the other party of his intention to call evidence.

7. The case on both sides shall then be considered closed

8. If the party opposed to the party beginning calls or reads evidence, the party beginning shall be at liberty to reply generally on the whole case, or he may, by leave of the court, call fresh evidence in reply to the evidence given on the other side, on points material to the determination of the issues, or any of them, but not on collateral matters.

9. Where evidence in reply is tendered and allowed to be given, the party against whom the same has been adduced shall be at liberty to address the court, and the party beginning shall be entitled to the general reply.

10. Documentary evidence must be put in and read, or taken as read by consent.

11. If either party intends to use documents in evidence he must lodge them with the registrar at or previously to opening his case, together with signed list of such documents, and he shall not afterwards be at liberty to put in any documents or additional documents unless the court shall otherwise order.

12. Every document put in evidence shall be marked by the registrar of the court at the time, and shall be retained by the court during the hearing, and returned to the party who put it in, or from whose custody it came, immediately after the judgment, unless it is impounded by order of the court.

13. In cases where written pleadings have been filed, or the parties or either of them are incapable of understanding their effect with sufficient accuracy, the preceding rules respecting the order of proceeding at the hearing shall be varied by the court so far as may be necessary. In particular, the statement of the defendant in defence where he does not admit the whole cause of action, shall be heard immediately after the plaintiff has concluded the statement of his claim and of the grounds thereof, and before any witness is examined, unless in any case the court shall direct otherwise.

14. The judge may in all cases disallow any question put in cross examination which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.

ORDER XLII

SUPPLEMENTAL STATEMENTS

1. Facts or circumstances occurring after the institution of a suit may, by leave of the court, be stated at any stage of the proceedings previous to the conclusion of the hearing, and the court may make such order as seems just respecting the proof of such facts or circumstances, or for affording all parties concerned leave and opportunity to meet the statements so introduced.

ORDER XLIII

REFERENCES

1. In any cause or matter in which all parties interested who are under no disability, consent thereto, and also without such consent in any cause or matter requiring any prolonged examination of documents or account or any scientific or local examination, which cannot in the opinion of the court, having regard to the business before it, conveniently be made by the court in the usual manner, the court may at any time, on such terms as it may think proper, order any question or issues of facts or any question of account arising therein, to be investigated before referee to be agreed upon between the parties, or, failing such agreement, appoint by the court.

2. In all such cases the court shall furnish the referee with such part of the proceedings and such information and detailed instructions as may appear necessary for his guidance, and shall direct the parties, if necessary, to attend upon the referee during the inquiry. The instructions shall specify whether the referee is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his investigation.

3. The court may at any stage of the proceedings direct any such necessary inquiries or accounts to be made or taken not

withstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

4. The referee may, subject to the order of the court, hold the inquiry at, or adjourn it to, any place which he may deem most expedient, and have any inspection or view which he may deem expedient, for the disposal of the controversy before him. He shall, so far as practicable, proceed with the inquiry *die in diem*.

5. Subject to any order to be made by the court ordering the inquiry, evidence shall be taken at any inquiry before a referee, and the attendance of witnesses to give evidence before a referee may be enforced by the court in the same manner as such attendance may be enforced before the court; and every such inquiry shall be conducted in the same manner as nearly as circumstances will admit as trials before a judge of the court, but not as to make the tribunal of the referee a public court of justice.

6. Subject to any such order as last aforesaid, the referee shall have the same authority in the conduct of any inquiry as a judge of the court when presiding at any trial.

7. Nothing in these rules contained shall authorize any referee to commit any person to prison or to enforce any order by attachment or otherwise; but the court may, in respect of matters before a referee, make any order of attachment or commitment it may consider necessary.

8. The referee may before the conclusion of any inquiry before him, or by his report under the reference, submit any question arising therein for the decision of the court, or state any facts specifically.

9. The proceedings and report in writing of the referee shall be received in evidence in the case unless the court may have reason to be dissatisfied with them, and the court shall have

power to draw such interferences from the proceedings or report as shall be just.

10. The court shall have power to require any explanations or reasons from the referee, and to remit the cause or matter or any part thereof, for further inquiry or consideration to the same or any other referee as often as may be necessary, and shall pass such ultimate judgment or order as may appear to be right and proper in the circumstances of the case.

ORDER XLIV

DISCONTINUANCE OF SUITS

1 (1) If before the date fixed for hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his claim, he shall give notice in writing of discontinuance or withdrawal to the registrar and to every defendant as to whom he desires to discontinue or withdraw. After the receipt of such notice such defendant shall not be entitled to any further costs with respect to the matter so discontinued or withdrawn than those incurred up to the receipt of such notice, unless the court shall otherwise order, and such defendant apply *ex parte* for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the court to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit.

(2) If in any other case the plaintiff desires to discontinue a suit or to withdraw any part of his claim, or if a defendant desires to discontinue his counterclaim, or withdraw any part thereof, such discontinuance or withdrawal may be allowed on such terms as to costs, and as to any subsequent suit and otherwise as to the court may seem just.

2. If any subsequent suit shall be brought before payment of the costs of a discontinued suit for the same or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.

ORDER XLIV (A)
APPEALS TO WEST AFRICAN COURT OF
APPEAL

ORDER XLV
NON – SUIT

1. The Court may in any suit, without the consent of parties, non-suit the plaintiff, where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the court.

2. The court may, upon motion for new trials, or review of judgment, order a non-suit of judgment to be entered, although no leave has been reserved at the trial.

ORDER XLVI
JUDGMENT

1. The decision or judgment in any suit shall be delivered in open court, unless the court otherwise directs.

2 .If the court reserves judgment at the hearing, parties to the suit shall be served with notice to attend and hear judgment, unless the court at the hearing states the day on which judgment will be delivered, in which case there shall be no further notice.

3. All parties shall be deemed to have notice of the decision or judgment if pronounced at the hearing, and all parties served with notice to attend and hear judgment shall be deemed to have notice of the judgment when pronounced.

4. A minute of every judgment, whether final or interlocutory, shall be made, and every such minute shall be a decree of the court, and shall have the full force and effect of a formal decree. The court may order a formal decree to be drawn up on the application of either party.

5. If the defendant shall have been allowed to set off any demand or counterclaim against the claim of the plaintiff, the judgment shall state what amount is due to the plaintiff, and what amount, if any, is due to the defendant, and shall be for the recovery of any sum which shall appear to be due to either party. The judgment of the court, with respect to any sum awarded to the defendant, shall have the same effect, and be subject to the same rules, as if such had been claimed by the defendant in a separate suit against the plaintiff.

6. A person directed by a decree or order to pay money or do any other act is bound to obey the decree or order without any demand for payment or performance, and if no time is therein expressed he is bound to do so immediately after the decree or order has been made (except as to costs, the amount whereof may require to be ascertained by taxation), unless the court shall enlarge the time by any subsequent order.

7. The court at the time of making any judgment or order, or at any time afterwards, may direct the time within which the payment or other act is to be made or done, reckoned from the date of the judgment or order, or from some other point of time, as the court thinks fit, and may order interest at a rate not exceeding five pounds per centum per annum to be paid upon any judgment, commencing from the date thereof or afterwards.

8. When any judgment or order directs the payment of money, the court may, for any sufficient reason, order that the amount shall be paid by instalments, with or without interest. Such order may be made at the time of giving judgment, or at

any time afterwards, and may be rescinded upon sufficient cause at any time.

[Former order xlvii (review) revoked by rules 3 of 1947]

ORDER XLVI
PROCEEDINGS UNDER THE LEGITIMACY
ORDINANCE

1. In this order:

‘Petitioner’ means a person applying for a legitimacy declaration and ‘petition’ has a corresponding meaning.

2. The Supreme Court Rules and practice shall so far as practicable govern all proceedings under the Legitimacy Ordinance, subject nevertheless to these rules.

(2) At least fifty six days’ notice of the day whereon the petition will be heard shall be given by the registrar to the Attorney – General. A respondent may within twenty eight days after service of the petition upon him file an answer to the petition.

Every answer which contains matter other than a simple denial of the facts stated in the petition shall be accompanied by an affidavit made by the respondent verifying such other matter as far as he has personal knowledge thereof, and deposing to his belief in the truth of the rest of such other matter.

(3). There shall be filed with the answer as many copies of the answer and the affidavit (if any) as there are other parties to the petition, and also two copies for the use of the court.

(4). The registrar shall within forty-eight hours of receiving them send by post one sealed copy of the answer and the

affidavit (if any) to the petitioner, the attorney general, and any other respondents.

12. Evidence on the hearing of the petition shall be given orally.

6. Provided that the judge may, on application made to him before or at the hearing, for good cause shown, direct that any particular fact or facts alleged in the petition or answer may be proved by affidavit.

13. The judge may make such orders as to costs as he shall think fit.

14. A copy of the order made on the hearing of a petition sealed with the seal of the court shall be supplied by the registrar to any party to the proceedings on payment of the prescribed fee.

ORDER XLVIII

PROBATE AND ADMINISTRATION

1. Preliminary

1. (1) Subject to the provisions of rules 41 and 42 of this order, when any person subject to the jurisdiction of the court dies all petitions for the granting of any probate of the will of, or for letters of administration of the estate of, the deceased person and all applications or other matters connected therewith shall be made to the administrator general at

Lagos who shall be the probate Registrar of the court.

(2) In regards to any such application made as aforesaid, the Chief Justice shall have power to request the court of any

judicial division to take measures and makes such orders as may appear necessary or expedient for the interim preservation of the property of the deceased within such judicial division, for the discovery or preservation of the will of the deceased or for any other purposes connected with the duties of the court under this order; and every court shall carry out any such request as far as practicable and report to the chief justice.

2. The court shall, when the circumstances of the case appear so to require, forthwith on the death of such deceased person, or as soon after as may be, appoint and authorize an officer of the court, or some other fit person, to take possession of his property within its jurisdiction, or put it under seal, and so keep it until it can be dealt with according to law.

3. If any person other than the person named executor or administrator, or an officer of the court or person authorized by the court, takes possession of and administers or otherwise deals with the property of any such deceased person, he shall besides the other liabilities he may incur, be liable to such fine not exceeding fifty pounds as the court, having regards to the conditions of the person so interfering with the property, and the other circumstances of the case, may think fit to impose.

4. Any person having in his possession or under his control any paper or writing of any such person deceased, being or purporting to be testamentary, shall forthwith deliver the original to the probate registrar of the court. If any person fails to do so for fourteen days after having had knowledge of the death of the deceased, he shall be liable to such fine not exceeding fifty pounds as the court, having regards to the condition of such person so in default and the other circumstances of the case, thinks fit to impose.

5 .Where it appears that any paper of the deceased, being or purporting to be testamentary, is in the possession of, or under the control of any person the court may in a summary way, whether a suit or proceedings respecting probate or

administration is pending or not, order him to produce the paper and bring it into court.

6. Where it appears that there are reasonable grounds for believing that any person has knowledge of any paper being or purporting to be testamentary (although it is not shown that the paper is in his possession or under his control), the court may in a summary way, whether a suit or proceeding for probate or administration is pending or not order that he may be examined respecting the same in court, or on interrogatories, and that he do attend for that purpose, and after examination that he do produce the paper and bring it into court.

2. Probate or Administration In General

7. The court may of its own motion, or on the application of any person claiming an interest under a will, give notice to the executors (if any) therein named, to come in and prove the will, or to renounce probate, and they, or some or one of them shall, within fourteen days after notice, come in and prove or renounce accordingly.

8. If any person named executor in the will of the deceased takes possession and administers or otherwise deals with any part of the property of the deceased, and does not apply for probate within one month after the death, or after the termination of any suit or dispute respecting probate or administration, he may, independently of any other liability, be deemed guilty of a contempt of court, and shall be liable to such fine, not exceeding fifty pounds, as the court thinks fit to impose.

9. The court shall require evidence, in addition to that offered by the applicant, where additional evidence in that behalf seems to the court necessary or desirable, in regard to the identity of the deceased or of the applicant, or in regard to any person or persons in existence with the right equal or prior to that of the applicant to the grant of probate or ad-

ministration sought by the applicant, or in regard to any other matter which may be considered by the court relevant to the question whether the applicant is the proper person to whom the grant should be made.

Provided that the court may refuse the grant unless the applicant produces the required evidence on these points or any of them.

10. Where it appears to the court that some person or persons other than the applicant may have at least an equal right with the applicant to the grant sought the court may refuse the grant until due notice of the application has been given for such person or persons to be heard in regards to the application.

Provided that the court may in its discretion refuse the grant unless and until all persons entitled to the grant in priority to the applicant shall have expressly renounced their prior right.

11. Every applicant for a grant of probate or letters of administration shall file in court a true declaration of all the personal property of the deceased and the value thereof.

provided that for the purpose of the fees payable on probate and letters of administration the value of the property in respect of which the grant is made shall be deemed not to include

a)Any gratuity payable by the government of Nigeria to the estate of any deceased European or African Officer formerly in the service of Nigeria or of the Nigerian railway;

b) Any sums of money payable to estates from statutory provident funds.

12. In no case shall the court issue probate or letters of administration until all enquiries which the court sees fit to institute have been answered to its satisfaction. The court shall however, afford as great a facility for the obtaining of probate or letters of administration as is consistent with due regards to the prevention of error and fraud.

13. A notice to prohibit a grant of probate or administration may be filed in the court.

14. The notice shall remain in force for three months only from the day of filing, but it may be renewed from time to time. The notice shall not affect a grant made on the day on which there was a warning in writing delivered at the place mentioned in the notice as his address.

15. Notices in the nature of citations shall be given in such manner as the court directs.

16. Suits respecting probates or administration shall be instituted and carried on as nearly as may be in the like manner and subject to the same rules of procedure as suits in respect of ordinary claims.

3. Custody of wills

17. Any person may, in his lifetime, deposit for safe custody in the court at Lagos his own will, sealed up under his own seal and the seal of the court.

18. Every original will, of which probate or administration with will annexed is granted, shall be filled and kept in the probate registry, in such manner as to secure at once the due preservation and convenient inspection of the same. A copy of every such will, and of the probate or administration, shall be preserved in a book kept for that purpose in the registry.

19. No original will shall be delivered out for any purpose without the direction in writing of the court where the will is filed.

An exemplification of the probate or administration with the will annexed may be obtained from the court.

4. Probate or Administration with Will Annexed

20. (1) on receiving an application for probate or for administration with will annexed, the court shall inspect the will, and see whether it appears to be signed by the testator, or by some other person in his presence, and by his direction, and

to be subscribed by two witnesses according to the enactments relative thereto, and shall not proceed further if the will does not appear to be so signed and subscribed.

(2) If the will appears to be so signed and subscribed, the court shall then refer to the attestation clause (if any), and consider whether the wording thereof states the will to have been in fact, executed in accordance with those enactments.

21. If there is no attestation clause, or if the attestation clause, is insufficient, the court shall require an affidavit from at least one of the subscribing witnesses, if either of them is living, to prove that the will was, in fact, executed in accordance with those enactments. The affidavit shall be engrossed and form part of the probate, so that the probate may be a complete document on the face of it.

22. If on perusal of the affidavit it appears that the will was not, in fact, executed in accordance with those enactments, the court shall refuse probate.

23. If both the subscribing witnesses are dead, or if from other circumstances such an affidavit cannot be obtained from either of them, resort for such an affidavit shall be to other persons (if any) present at the execution of the will; but if no such affidavit can be obtained, proof shall be required of that fact, and of the handwriting of the deceased and of the subscribing witnesses, and also of any circumstances raising a presumption in favour of the due execution of the will.

23. Where the testator was blind or illiterate, the court shall not grant probate of the will, or administration with the will annexed, unless the court is first satisfied, by proof or by what appears on the face of the will, that the will was read over to the deceased before its execution, or that he had at that time knowledge of its contents.

24. The court, on being satisfied that the will duly executed, shall carefully inspect it to see whether there are any interlineations or alterations, or erasures, or obliterations

appearing in it, and requiring to be accounted for. Interlineations, alterations, erasures and obliterations are invalid unless they existed in the will at the time of its execution, or unless if made afterwards, they have been executed and attested in the mode required by the said enactments, or unless they have been made valid by the re-execution or by the subsequent execution of some codicil thereto. Where interlineations, alterations, erasures, or obliterations appear in the will (unless duly executed or recited in or otherwise identified by the attestation clause), an affidavit in proof of their having existed in the will before its execution shall be filed. If no satisfactory evidence is adduced respecting the time when an erasure or obliteration was made, and the words erased or obliterated are not entirely effaced, and can, on inspection of the will, be ascertained, they shall form part of the probate. Where any words have been erased which might have been of importance, an affidavit shall be required.

25. (1) Where a will contains a reference to any document of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the court shall require the production of the document, with a view to ascertaining whether or not it is entitled to probate; and if it is not produced, a satisfactory account of its non-production shall be proved. A document cannot form part of a will unless it was in existence at the time when the will was executed.

(2) If there are vestiges of sealing wax or wafers, or other marks on the will, leading to the interference that some document has been at some time annexed or attached thereto, a satisfactory account of them shall be proved, or the production of the document shall be required, and if it is not produced, a satisfactory account of its non-production shall be proved.

26. Where a person appointed executor in a will survives the testator, but either dies without having taken probate, or

having been called on by the court to take probate, does not appear, his right in respect of the executorships wholly ceases; and without further renunciation, the representation to the testator and the administration of his property may go and be committed as if that person had not been appointed executor.

27. Every will or copy of a will to which an executor or an administrator with the will annexed is sworn shall be marked by the executor or administrator and by the person before whom he is sworn.

28. The rules respecting wills apply equally to codicils.

29. In every case where evidence is directed or allowed to be given by an affidavit, the court may require the personal attendance of the deponent, if within the jurisdiction, before the court to be examined viva voce respecting the matter of his affidavit. The examination may take place before any affidavit has been sworn or prepared, if the court thinks fit.

5. Administration (not with Will)

30. (1) the court in granting letters of administration shall proceed as far as may be as in cases of probate.

(2) The court shall ascertain the time and place of deceased's death, and the value of the property to be covered by the administration.

31. (1) The person to whom administration is granted shall give a bond, with two or more responsible sureties, to the Probate Registrar of the court, to ensure to the Probate Registrar for the time being conditioning for duly collecting, getting in, and administering the personal property of the deceased, such sureties to be to the satisfaction of the Probate Registrar.

(2) The court may, if it thinks fit, take one surety only.

(3) The bond shall be in a penalty of double the amount under which the personal estate of the deceased is sworn, unless the court in any case thinks it expedient to reduce the amount.

(4) The court may also in any case direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the court thinks reasonable.

32. The Probate Registrar may, on being satisfied that the condition of the bond has been broken, assign the same to some person, and that person may thereupon sue on the bond in his own name, as if it had been originally given to him instead of the Probate Registrar, and may recover thereon, as trustee for persons interested, the full amount recoverable in respect of any breach of the condition of the bond.

6. Administration of Property

34. Any person claiming to be a creditor or legatee, or the next of kin, or one of the next of kin, of a deceased, may apply for and obtain a summons from the court requiring the executor or administrator (as the case may be) of the deceased to attend before the court and show cause why an order for the administration of the property of the deceased should not be made.

35. (1) On proof of service of the summons or on appearance of the executor or administrator, and on proof of all such other things (if any) as the court may direct, the court may, if it thinks fit, make an order for the administration of the property of the deceased.

(2) the court shall have discretionary power to make or refuse any such order, or to give any special discretions respecting the carriage or execution of it, and in the case of applications for such an order by two or more different persons or classes or persons, to grant the same to such one or more of the claimants or classes of claimants, as the court thinks fit.

(3) If the court thinks fit the carriage of the order may subsequently be given to such person, and on such terms as the court may think fit.

36. On making such an order, or at any time afterwards, the court may, if it thinks fit, make any further or other order which may appear requisite to secure the proper collection, recovery safe keeping and disposal of the property or any part thereof.

37. In a case of intestacy, where the peculiar circumstances of the case appear to the court so to require, the court may if it thinks fit, on the application of any person having interest in the estate of the deceased, or of its own motion, grant letters of administration to an officer of the court or to a person in the service of the government.

38. (1) the officer or person so appointed shall act under the direction of the court, and shall be indemnified thereby.

(2) The court shall require and compel him to file in the court his account of his administration at intervals not exceeding three months.

39. where a person has died intestate as to his personal estate or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall, at the time of the death of such person, be resident out of the jurisdiction, and it shall appear to the court to be necessary or inconvenient in any such case to appoint some persons to be the administrators of the personal estate of the deceased, or of any part thereof, the court may appoint such person as it shall think fit to be such administrator upon his giving such security, if any, as the court shall direct, and every such administration may be limited as the court shall think fit.

40. The court may direct that any administrator (with or without the will annexed) shall receive out of the personal and real estate of the deceased such reasonable remuneration as the court shall think fit, not exceeding a fee of the three pounds, and in addition thereto a sum not exceeding five per centum on the amount realized property, or, when not converted into

money, on the value of the property duly administered and accounted for by him.

Provided that where the court shall be satisfied that by reason of exceptional circumstances the administration of the property has required an extraordinary amount of labour to be bestowed on it, the court may allow in respect of such property a higher rate of remuneration.

7. Administration of the Estates of Citizens of the United States of America

41.(1) where any citizen of the United States of America dies within the jurisdiction without leaving within the jurisdiction a widow or next of kin, then, if any such person within a Government Station, or had his usual place of resident therein, the magistrate having jurisdiction within such station, or if he did not die within a government station, or had not his usual place of resident therein, then the resident in charge of the province in which he died, shall collect and secure all moneys and other property belonging to the deceased, and shall then request the chief secretary to inform the nearest consular officer of the United States of America of the death of the deceased, and transmit to him a list of the money and property of the deceased.

(2) In the case last mentioned in which it is declared that a resident shall collect and secure all money and other property of the deceased, such resident may appoint any district officer attached to his province, or, with his consent, any magistrate or any district officer attached to any other province, to act in his place.

ORDER XLIX

REFERENCE TO ARBITRATION

1. If the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters,

should be referred to the decision of one or more arbitrator or arbitrators, they may apply to the court at any time before final judgment for an order of reference and the court may on such application make an order of reference accordingly.

2. The arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination, or if the person's nomination shall be made by the court, the court shall appoint the arbitrators.

3. The court shall by an order under its seal refers to the arbitrators the matters in difference in the suit which they may be required to determine, and shall fix a time for the delivery of the award, and the time so fixed shall be stated in the order.

4. If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among them, by the appointment of an umpire, or by declaring that the decision shall be with the majority, or by empowering the arbitrators to appoint an umpire, or otherwise, as may be agreed between the parties, or if they cannot agree, as the court may determine.

5. When a reference to arbitration is made by an order of court, the same process to the parties and witnesses, whom the arbitrators or umpire may desire to have examined, shall issue as in ordinary suits; and persons not attending in compliance with such process, or making any other default, or refusing to give evidence, or being guilty of any contempt of the arbitrators or umpire during the investigation of the suit, shall be subject to the disadvantages, penalties, and punishments, by order of the court on the representation of the arbitrators or umpire, as they would incur for the same offences in suits tried before the court.

6. When the arbitrators shall not have been able to complete the award within the period specified in the order from want of the necessary evidence or information, or other good and sufficient cause, the court may from time to time

enlarge the period for the delivery of the award, if it shall think proper. In any case in which an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if they shall have allowed their time, or their extended time, to expire without making an award or shall have delivered to the court, or to the umpire, a notice in writing stating that they cannot agree.

Provided that an award shall not be liable to be set aside only by reason of its not having been completed within the period allowed by the court, unless on proof that the delay in completing the award arose from misconduct of the arbitrators or umpire, or unless the award shall have been made after the issue of an order by the court superseding the arbitration and recalling the suit.

7. If, in any case of reference to arbitration by an order of court, the arbitrators or umpire shall die, or refuse or become incapable to act, it shall be lawful for the court to appoint a new arbitrator or arbitrators, or umpire in the place of the person or persons so dying, or refusing or becoming incapable to act. Where the arbitrators are empowered by the terms of the order of reference to appoint an umpire, and do not appoint an umpire, any of the parties may serve the arbitrators with a written notice to appoint an umpire, and if within seven days after such notice shall have been served no umpire be appointed, it shall be lawful for the court upon the application of the party having served such notice as aforesaid, and upon proof to its satisfaction of such notice having been served, to appoint an umpire. In any case of appointment under this rule the arbitrators or umpire so appointed shall have the like power to act in the reference as if their names had been inserted in the original order of reference.

8. The award shall contain a conclusive finding, and may not find on the contingency of any matter of fact being afterwards substantiated or deposed to. It shall comprehend a finding on each of the several matters referred.

9. It shall be lawful for the arbitrators or umpire upon any reference by an order of court, if they shall think fit, and if it is provided to the contrary, to state their award as to the whole or any part thereof in the form of a special case for the opinion of the court.

10. The court may, on the application of either party, modify or correct an award where it appears that a part of the award is upon matters not referred to the arbitrators; provided such part can be separated from the other part, and does not affect the decision on the matter referred; or where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decisions.

11. The court may also, on such application, make such orders as it thinks just respecting the costs of the arbitration, if any question arise respecting such costs or their amount, and the award contains no sufficient provision concerning them.

12. In any of the following cases the court shall have power to remit the award, or any of the matters referred to arbitration, for reconsideration by the arbitrators or umpire, upon such terms as it may think proper, that is to say:

a) If the award has left undetermined some of the matters referred to arbitration, or if it has determined matters not referred to arbitration;

b) If the award is so indefinite as to be incapable of execution;

c) If an objection to the legality of the award is apparent upon the face of the award.

13. No award shall be liable to be set aside, except on the grounds of perverseness or misconduct of the arbitrator or umpire. Any application to set aside an award shall be made within fifteen days after the publication thereof.

14. If no application shall have been made to set aside the award, or to remit the same, or any of the matters referred, for reconsideration, or if the court shall have refused any such

application, either party may file the award in court, and the award shall there upon have the same force and effect for all purposes as a judgment.

ORDER L

APPEALS FROM NATIVE COURTS IN CIVIL CASES

1. When an appeal is made from any order or decision of a native court, or a native court of appeal, in a civil case to the Supreme Court in accordance with the provisions of the Native Court Ordinance, such appeal shall be entered at the Supreme Court, hereafter in this order referred to as the appeal court, in that judicial division in which is the native court or native court of appeal, from which the appeal is made.

2. An appellant shall enter his appeal within thirty days of the order or decision appealed against.

3. Every appeal shall be entered in the form of the petition in writing presented by the appellant or someone duly authorized to do so on his behalf, unless the appeal court permits the appellant to dictate his prayer to the registrar or other officer of the appeal court, or to state orally his prayer to the appeal court and the appellant shall (unless the appeal court directs) attach to the petition or produce to the registrar or court, a copy of the order or judgment appealed against.

4. Every appellant shall when entering his petition give to the registrar a postal address to which notices may be sent to him, or if unable to do so he shall from time to time call at, or send his agent to, the court to collect any notices awaiting him, and any notice or other communication addressed accordingly or left at the court as the case may be shall be deemed to have reached the appellant.

5. On receiving the petition and copy the order or judgment, the appeal court shall peruse the same and, if it considers that there is not sufficient ground for interfering, it

may dismiss the appeal summarily, provided that no appeal shall be dismissed under this rule unless the appellant, or his Barrister or solicitor (if the appeal court has been notified that he has a barrister or solicitor) has had a reasonable opportunity of being heard in support of the same.

6. Before dismissing an appeal under the last preceding rule, the appeal court may call for the record of the case, and may call and examine any person or persons, whether they gave evidence before the native court or not, whose testimony may be material in deciding whether to dismiss the appeal summarily or not, but shall not be bound to do either.

7. If the appeal court decides not to do dismiss the appeal summarily, it may order appellant to find within one month security for any costs, which may be given against him, and for the making of copies of the petition and records of the case for the respondents, and for the petition and records of the case for the respondents, and for the translation thereof, if necessary or for any of these purposes. The appeal court shall then call for the record of the case and cause notice of the appeal and of the time and date fixed for the hearing thereof to be given to the appellant and to the respondent, or other person, if any, who may be entitled to appear and oppose the appeal, and shall cause the appeal to be set down for hearing, and if the appellant is in custody shall require the officer in charge of the prison in which the appellant is in custody to produce him before the court on the day fixed for the hearing, provided that when an advocate is to appear for him the court need not give such notice to the officer in charge of the prison.

8. At the hearing of the appeal the appeal court may allow or require, witnesses to be called, whether or not they gave evidence before the native court, and may order any reference to be made, and call for any document or other exhibit, and may inspect any object or place and may call for and examine the original native court records and adjourn the hearing from time to time and place to place and may do or order to be done

anything which it would have had power to do or order had the case been before the appeal court in the exercise of its original jurisdiction and may at the determination of the hearing exercise any of the powers given to it by section 40 of the Native Court Ordinance.

9. At any time after an appeal has been until the determination thereof by the appeal court, the appeal court may, on the application of the appellant or of its own motion, order that the execution of the order or decision appealed from be suspended, either with or without security for the eventual performance thereof should the appeal fail, and if the appellant is in custody may order his release on bail or on his own bond, and shall send notice of all such orders to the court of first instance or to the person or authority empowered to put into execution such courts order or decision. The appeal unless the court of first instance did, or had power to, order a sentence of imprisonment should the fine not have been paid.

10. When an appeal is entered out of time, the petition, dictation or statement required by rule 3 of this order shall also state the grounds on which the appellant bases his prayer for leave to appeal out of time, and the appeal court may summarily refuse such leave, without hearing the appellant or his advocate in support thereof.

11. When an appeal is made to the Supreme Court and such appeal would, but for the provisions of section 32 of the Native Courts Ordinance, have lain to a magistrate court, the petition or dictation or statement, require by rule 3 of this order, shall in the first part thereof state if such be the fact that the district officer sat in the court of first instance as president or adviser thereof.

12. No appeal shall be entered except upon payment of the prescribed fee, and thereafter no step shall be taken in an appeal and if any fee shall not be paid within thirty days after it became due, the appeal shall lapse, unless the appeal court sees fit to extend the time on sufficient cause being shown. An

application for such extension, which may be made after the appeal shall have so lapsed, shall be made in the manner and on payment of the fees, prescribed by the rules for making interlocutory applications.

13. When the records of the court of first instance are kept in the vernacular the appeal court may require the appellant at any stage of the appeal to pay into court such sum of money as will enable an adequate translation or interpretation thereof to be made and may adjourn the further hearing until the amount has been paid, non-payment of which will after thirty days cause the appeal to lapse. A translation under this rule shall be verified by the certificate thereon of an administrative officer or by an affidavit, or evidence given in court, of any other person.

14. When an appeal has been determined by a magistrate's court in the exercise of its appellant jurisdiction and a further thereon, shall be the same as in an appeal from a magistrate's court in the exercise of its original jurisdiction.

15. Any notice, order or communication, which a court is required or empowered by these rules to give to any other court or native court or person, shall be as in form provided in the First schedule to these rules.`

ORDER LI APPLICATIONS UNDER SECTION 47 OF THE NATIVE COURTS ORDINANCE

1. An application to the Supreme Court in a civil case under section 47 of the Native Court Ordinance shall be made by motion and shall be accompanied by a written statement in duplicate, of the grounds of the application.

Provided that if the applicant is illiterate and not represented by a barrister or solicitor he may be permitted to dictate his grounds of application to any person appointed by the court who shall also make a duplicate thereof. The

duplicate shall be given to such person, if any, as is entitled to oppose the application on his applying thereof.

2. On receiving an application under this order, the court shall notify the native court thereof and call for a certified copy of the record of any proceedings that may have been taken in the native court in the cause or matter in respect of which the application is made.

3. Upon receipt of such certified copy the court shall give notice to the applicant and respondent, if any, of the day on which the application will be heard.

4. The hearing of the application may be conducted in the same manner as the hearing of a suit.

5. Applications under this order shall be made to the Supreme Court in the judicial division in which the native court is situated.

ORDER LII

MISCELLANEOUS PROVISIONS

1. The sittings of the court for the hearing of causes shall ordinarily be public; but the court may, for special reasons, hear any particular cause or matter in the presence only of the parties with their legal advisers (if any) and the officers of court.

2. Subject to particular rules, the court may in all causes and matters make any order which it considers necessary for doing justice, whether such order has been expressly asked for by the person entitled to the benefit of the order or not.

3. All fines, forfeitures, pecuniary penalties and costs ordered to be paid may be levied by distress, seizure and sale of the movable and immovable property of the person making default in payment.

4. In all cases in which the publication of any notice is required, the same may be made by advertisement in the Gazette, unless otherwise ordered by the court.

5. The several offices of the court shall be open at such times as the chief Justice shall direct.

6. A document shall not be filed unless it has endorsed on it the name and number of the cause, the date of filing, and whether filed by plaintiff or defendant; and on being filed such endorsement shall be initialled by the registrar.

7. In any cause or matter to which the crown, the government, the governor, or the head of any government department in his official capacity is a party, any government officer may appear, plead and act for such party, if authorized by the governor or the head of government department, as the case may be.

"This work is a must read handbook for judges, legal practitioners, registry staff, law professors, students and all those interested in the development of the law in Cameroon west of the Mungo" Justice (Mrs) Lucy Asuagbor, Chief Justice, South West Region, Buea, Cameroon

"Written by an author who is a renowned researcher with an extensive experience in practice across Cameroon and Nigeria, the book treats the subjects covered with lucidity and an admirable practice oriented style. By taking account of developments under the OHADA laws and their impacts on civil practice in the Anglophone courts, it brings important national perspectives on civil practice to the fore. I welcome this book because it fills a real gap and is written with the clarity and depth of thought consistent with the author's academic and practice standing"

FONKWE JOSEPH FONGANG, FORMER SUPREME COURT JUDGE, ATTORNEY GENERAL, SOUTH WEST REGION, BUEA, CAMEROON

This book, the first of its kind on Anglophone Cameroon, brings significant local context into the practice of law particularly at a juncture when civil practice has been radically altered by Cameroon's ongoing effort at harmonization of both the substantive and procedural laws applicable in the courts. The book covers a wide spectrum of topics including: the commencement of civil actions, jurisdiction, simplified recovery procedures and measures of execution, provisional execution and stay of execution. It provides a detailed analysis of the relevant rules of court applicable in both the high court and court of appeal. One of its major strengths lies in its use of recent cases to demonstrate the way Cameroonian judges have dealt with local procedural laws, as well as how the differences between Cameroonian indigenous rules of practice and those imported particularly from Nigeria and England are reconciled.

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